

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906. 1907

No. 125

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

**THE UNITED STATES FIDELITY & GUARANTY COM-
PANY OF BALTIMORE, MARYLAND, AND AUGUSTUS
W. HOGGS.**

**IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.**

FILED MARCH 11, 1907.

(23583)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 1008.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND, AND AUGUSTUS W. BOGGS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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No. 1982

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE UNITED STATES FIDELITY AND GUARANTY
COMPANY OF BALTIMORE, MARYLAND (a
Corporation),

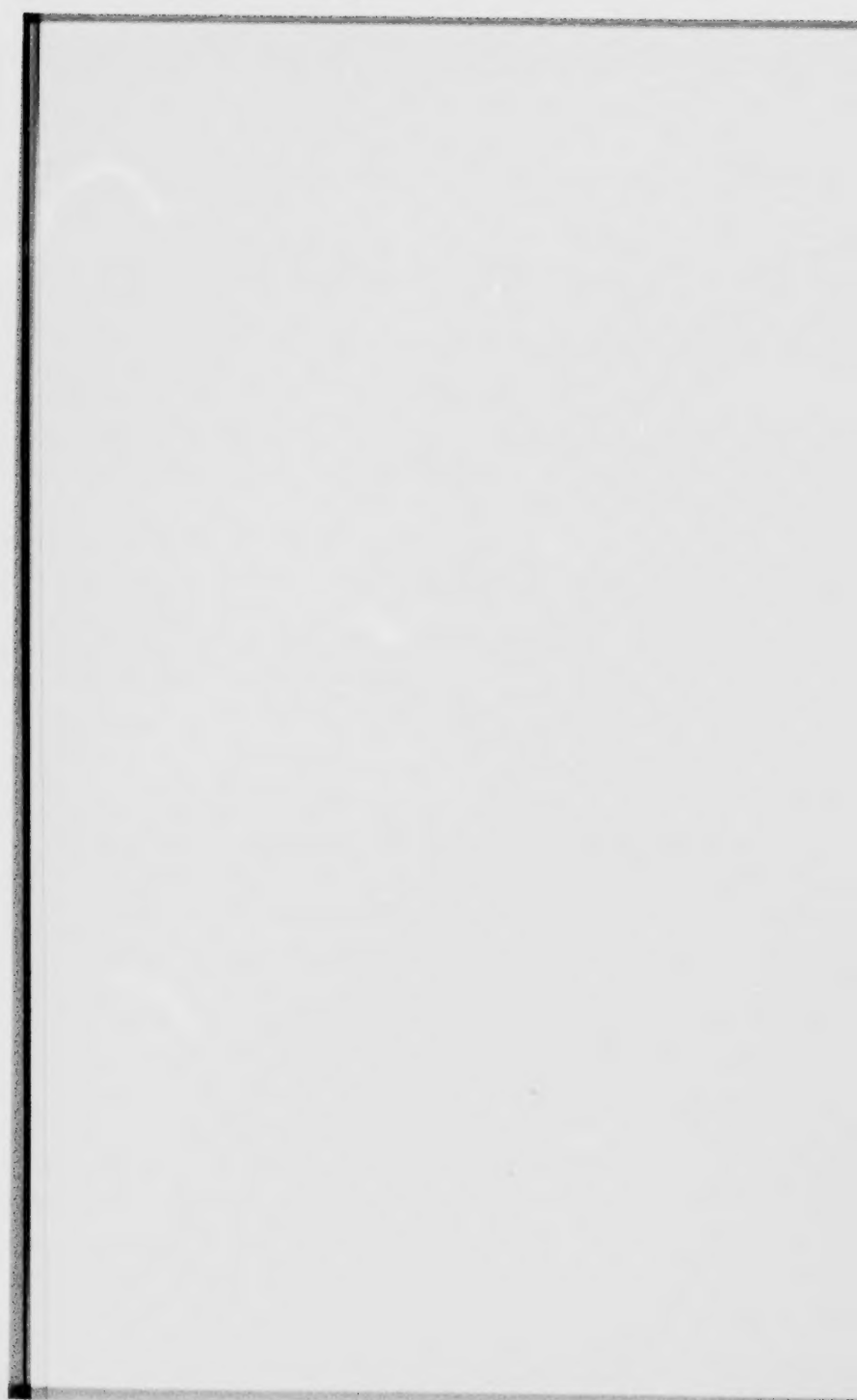
Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,
Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit
Court for the Southern District of California,
Southern Division.



*In the United States Circuit Court of Appeals,
Ninth Judicial Circuit.*

UNITED STATES FIDELITY AND GUARANTY
COMPANY OF BALTIMORE, MARYLAND
(a Corporation),

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Writ of Error [Original].

The President of the United States to the Honorable
the Judge of the Circuit Court of the United
States for the Southern District of California,
Greeting:

Because in the records and proceedings and also
in the rendition of the judgment of a plea which is
in the Circuit Court before you between the United
States Fidelity and Guaranty Company of Baltimore,
Maryland, a corporation, plaintiff in error, and the
United States of America, defendant in error, a
manifest error has appeared, to the great damage
of said United States Fidelity and Guaranty Com-
pany of Baltimore, Maryland, a corporation, plain-
tiff in error, as by its complaint appears, we being
willing that the error, if any has been made, should
be duly corrected and full and speedy justice done
to said party aforesaid, in this behalf do command
you if judgment be therein given under your seal,
distinctly and openly that you send the records and
proceedings aforesaid and all things concerning the

2 *The United States Fidelity etc. Co.*

same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in the State of California, on the 15th day of February, 1911, in the said Circuit Court of Appeals to be then and there held, and that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable EDWARD D. WHITE,
Chief Justice of the Supreme Court of the United States, the 16th day of January, 1911.

[Seal] WM. M. VAN DYKE,
Clerk of the Circuit Court of the United States of
America, Ninth Circuit in and for the Southern
District of California.

By Chas. N. Williams,
Deputy Clerk.

The above Writ of Error is hereby allowed.

OLIN WELLBORN,
Judge.

I hereby certify that a copy of the within Writ of Error was on the 16th day of January, 1911, lodged in the Clerk's office of the said United States Circuit Court for the Southern District of California, Southern Division, for the said defendant in error.

WM. M. VAN DYKE,
Clerk United States Circuit Court, Southern Dis-
trict of California.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: In the United States Circuit Court of Appeals, Ninth Judicial Circuit. United States Fidelity and Guaranty Company of Baltimore, Maryland, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Jan. 16, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

*In the United States Circuit Court of Appeals,
Ninth Judicial Circuit.*

UNITED STATES FIDELITY AND GUARANTY
COMPANY OF BALTIMORE, MARYLAND
(a Corporation),

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Citation on Writ of Error [Original].

The President of the United States, to The United States of America, and to A. I. McCormick, Esq., United States District Attorney, and G. Ray Horton, Esq., Assistant United States District Attorney, Attorneys for said Defendant in Error, Greeting:

You are hereby cited and admonished to appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco in the State of California, within thirty (30) days from the date of this writ, pursuant to the writ of error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of

California, Southern Division, in that certain action wherein the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, is plaintiff in error, and you are defendant in error, to show cause if any there be, why the judgment in the said writ of error should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States of America, this 16th day of January, A. D. 1911, and of the Independence of the United States the one hundred and thirty-fourth.

OLIN WELLBORN,
United States District Judge for the Southern District of California, presiding in the Circuit Court.

Service of the within Citation on Writ of Error admitted this 16th day of January, 1911.

A. I. McCORMICK,
U. S. Attorney.
By G. RAY HORTON,
Asst. U. S. Atty.

[Endorsed]: In the United States Circuit Court of Appeals, Ninth Judicial Circuit. United States Fidelity and Guaranty Company of Baltimore, Maryland, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Jan. 16, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

[Answer to Writ of Error—Original.]

The Answer of the Judges of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division:

The record and all proceedings of the complaint whereof mention is within made, with all things touching the same, we certify, under the seal of our said Circuit Court to the United States Circuit Court of Appeals for the Ninth Circuit, in a certain schedule to this writ annexed, as within we are commanded.

By the Court.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

[Complaint.]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUGUSTUS W. BOGGS AND THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND (a Corporation),

Defendants.

Comes now the plaintiff above named, by Oscar Lawler, United States Attorney for the Southern District of California, acting pursuant to directions of the Attorney General of the United States in that behalf, and complaining of the defendant above-named, for cause of action alleges:

I.

That the United States Fidelity & Guaranty Company, one of the defendants above named, is now, and at all the times herein mentioned has been, a corporation, organized and existing under and by virtue of the laws of the State of Maryland and doing and transacting business as a surety and guaranty company in the Territory of Arizona and in the State and Southern District of California, and having a resident agent in said Southern District of California upon whom service of process against said corporation may be made; that the defendant, Augustus W. Boggs, is now and at all times mentioned in this complaint was a resident of the Southern Division of the Southern District of California and now resides therein.

II.

That, heretofore, and on the 23d day of February, 1905, the said United States of America, pursuant to proceedings [2*] regularly had and taken in that behalf by the Department of the Interior of the said United States, acting by and through the then acting Commissioner of Indian Affairs, C. F. Larrabee, made and entered into a certain contract in writing with Augustus W. Boggs, one of the defend-

*Page-number appearing at foot of page of original Certified Record.

ants above named, under and by the terms of which said contract said Augustus W. Boggs did, for a consideration named in said contract, to wit, the sum of Twelve Thousand and Seven Hundred and Nine (\$12,709) Dollars, agree to furnish all the labor and materials and to do and perform all the work required to construct and complete a stone mess-hall and kitchen at the Rice Station Indian School in the Territory of Arizona in strict and full accordance with the terms of a certain advertisement in said contract set forth and with the requirements of certain drawings, plans and specifications, copies of which were attached to and made a part of said contract and embodied therein, and to complete said mess-hall and kitchen in accordance with said plans, drawings and specifications and to turn the same over to the said United States of America, acting through and by said Acting Commissioner of Indian Affairs as aforesaid, on or before the 1st day of September, 1905; that under and by the terms of said contract it was further provided that should the said Augustus W. Boggs neglect, fail or refuse to complete the construction of said stone mess-hall and kitchen in accordance with said plans, drawings and specifications hereinabove and therein referred to, within the time in said contract specified, as aforesaid, there should be deducted from the contract price of Twelve Thousand Seven Hundred and Nine (\$12,709) Dollars, as aforesaid, Twenty (\$20.00) Dollars per day for each and every day that the completion and delivery of said work should be delayed beyond said 1st day of September, 1905;

that in and by said contract it was further stipulated [3] and agreed by said Augustus W. Boggs that he, said Augustus W. Boggs, would accept and receive said contract price of Twelve Thousand Seven Hundred and Nine (\$12,709.00) Dollars, less said sum of Twenty (\$20.00) Dollars per day for each and every day of delay, as hereinabove and in said contract set forth, in full payment for the construction and completion of said stone mess-hall and kitchen at said Rice Station Indian School in the Territory of Arizona as aforesaid; that under and by the terms of said contract, it was further provided that if, through any fault of the said plaintiff above named, said defendant, Augustus W. Boggs, should be delayed in the execution of the work included in said contract, he, the said Augustus W. Boggs, should be allowed one working day additional to the time above stated, to wit, in addition to and beyond the 1st day of September, 1905, for each and every day of delay so caused by said plaintiff above named, and that any delay which should be so occasioned by said plaintiff would be ascertained by the said Commissioner of Indian Affairs; that in and by the terms of said contract it was further provided that no claim should be made or allowed by or on behalf of said defendant, Augustus W. Boggs, for any damages that might arise out of any delay occasioned by said plaintiff. And under and by the terms of said contract as aforesaid it was further provided and agreed by and between the parties thereto that said United States of America reserved the right to make changes, alterations or

omissions from or additions to the work and materials in said contract provided for, and that the valuation of such work and materials, if not agreed upon, should be determined on the basis of the unit of value or material and work referred to in said contract, or, in the absence of such unit of value, on the prevailing market rates, which market rates, in case of dispute, should be determined by [4] said Commissioner of Indian Affairs, whose decision with reference thereto should be binding upon both parties; that under and by the terms of said contract it was further provided that no claim of damages, on account of any such changes or for anticipated profits under said contract, should be made or allowed; that said Augustus W. Boggs should not be allowed any additional compensation for labor or material unless he should receive written authority from the said Commissioner of Indian Affairs and the price agreed upon before the execution of such labor or the furnishing of such material; that no addition to or omission from the work in said contract specifically provided for should make void or affect any other provisions or *convenats* of said contract, but that the differences in the cost thereby occasioned should be added to or deducted from the amount of said contract price; that, in the absence of any express agreement or provision to the contrary, no addition to or omission from the work provided for by said contract should be construed to extend the time fixed therein for the final completion of the work provided for thereby. That under and by the terms of said contract it was further provided that

should the said Augustus W. Boggs fail to complete the work therein contracted for, or any part thereof, in accordance with said agreement and within the time therein provided for, or should fail to prosecute said work with such diligence as in the judgment of the said plaintiff would insure the completion of said work within the time specified in said contract, said United States of America might withhold all payments for work in place at the time of such failure to complete or prosecute said work until the final completion and acceptance of said mess-hall and kitchen, and said plaintiff was thereby authorized and empowered, after eight days' due notice thereof, in writing, to the [5] said Augustus W. Boggs (the said Augustus W. Boggs having failed within said period of eight days to take such action as would in the judgment of the said United States of America remedy the default for which said notice was given), take possession of the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said Augustus W. Boggs delivered on the site of said stone mess-hall and kitchen, and, at the expense of said Augustus W. Boggs, to complete or to have completed the said work, and to supply or have supplied the labor, materials and tools of whatever character necessary to be purchased or supplied by reason of any default of the said Augustus W. Boggs in the performance of said contract, and that in such event said Augustus W. Boggs and the sureties upon the bond, in said contract and hereinafter referred to, to be given for the faithful per-

formance of said contract, should be further liable for any damages incurred through such default and from any and all breaches of said contract; that under and by the terms of said contract it was further provided that the materials delivered and the work to be done under said contract should be subject to the inspection of the said plaintiff and of the said Commissioner of Indian Affairs and of some person or persons appointed by said Commissioner, with the right, on the part of the said plaintiff above named, to reject any part of said materials which should not conform to said contract, and that the decision of said United States of America in that behalf should be final; that under and by the terms of said contract it was further provided that in the execution of said work said Augustus W. Boggs would comply strictly with the provisions of the Act of Congress, approved August 1, 1892, relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and the District of [6] Columbia, and the Act of Congress approved August 13, 1894, for the protection of persons furnishing labor and materials in the construction of public works; that under and by the terms of said contract it was further provided that neither said contract or any interest therein should be transferred to any other person or persons, and that any such transfer should cause the annulment of said contract so far as the said United States were concerned, and that all rights of action for any breach of said contract by the contracting parties were reserved to the said

United States; that under and by the terms of said contract it was further provided that said Acting Commissioner of Indian Affairs, acting for and on behalf of the said United States of America, plaintiff above named, agreed to pay and cause to be paid to the said Augustus W. Boggs, on the presentation of proper receipts or vouchers in duplicate to the Commissioner of Indian Affairs, the sum of Twelve Thousand Seven Hundred and Nine (\$12,709.00) Dollars in lawful money of the United States, in consideration of the performance of all of the terms of said contract by the said Augustus W. Boggs, such payment to be made as follows: Eighty (80%) per cent of the value of work executed and actually in place to the satisfaction of the said plaintiff at the expiration of each thirty (30) days during the progress of said work, the amount of each such payment to be computed upon the actual amount of labor and materials expended during the said period of thirty (30) days for which partial payment should be made, the value of such labor and materials to be ascertained by the said United States of America; and that the balance of said contract price should be retained by said United States of America until the completion of the entire work provided for in said contract, on the approval and acceptance thereof by said plaintiff, and that said amount so retained should be forfeited by said Augustus W. Boggs [7] in the event of the nonfulfillment of said contract; under and by the terms of said contract, it was expressly covenanted and agreed that any such forfeiture

should not relieve the said Augustus W. Boggs from liability to the said United States of America for any and all damages sustained by reason of any breach of said contract; that under and by the terms of said contract it was further agreed and understood that the same should not be of full force and effect until approved by the Secretary of the Interior; that said contract on the date last above named, to wit, the 23d day of February, 1905, was on behalf of the said United States of America signed and sealed by C. F. Larrabee, who was then Acting Commissioner of Indian Affairs, and by the said Augustus W. Boggs.

That thereafter, on the 11th day of March, 1905, and as a part of the transaction of making and entering into said contract hereinbefore referred to, and as provided for in said contract, said defendant, Augustus W. Boggs, as principal, and the defendant, United States Fidelity & Guaranty Company, of Baltimore, Maryland, corporation as aforesaid, made and entered into their certain bond and undertaking in writing, to secure the faithful performance of said contract hereinbefore referred to, a copy of which said bond and undertaking in writing is attached to this complaint and is hereby referred to and made a part hereof and marked Exhibit "A."

That thereafter and on the 27th day of March, 1905, said contract and bond were, in accordance with the terms thereof, approved by the then Secretary of the Interior of the United States of America.

That thereafter said Augustus W. Boggs did commence operations under and pursuant to the terms of said contract and did furnish certain materials

and do certain work in purported [8] compliance therewith; that in accordance with the terms of said contract, and as said work progressed, on the 10th day of June, 1905, said plaintiff above named paid and caused to be paid unto the said Augustus W. Boggs the sum of Four Thousand Three Hundred Fifty-six and 24/100 Dollars (\$4,356.24), and that thereafter and pursuant to the terms of said contract, and on the 21st day of July, 1905, said plaintiff paid and caused to be paid to the said Augustus W. Boggs the further sum of Three Thousand Five Hundred Thirty-nine and 16/100 (\$3,539.16) Dollars, making a total of moneys paid by said plaintiff in accordance with the terms of said contract as aforesaid, the sum of Seven Thousand Eight Hundred Ninety-five and 40/100 (\$7,895.40) Dollars; that no part of said sum of Seven Thousand Eight Hundred Ninety-five and 40/100 (\$7,895.40) Dollars has been repaid or returned to said plaintiff; that said Augustus W. Boggs did not, nor did anyone on his behalf, furnish all of the labor and materials, nor did he do or perform all of the work required to construct and complete a stone mess-hall and kitchen at Rice Station Indian School, as provided for by the terms of said contract as aforesaid, nor did he, on or before the 1st day of September, 1905, or at all, complete the work provided for in said contract, nor did he at or before said last-mentioned date, or at all, turn over to the said plaintiff the said stone mess-hall and kitchen at the said Rice Station Indian School, either in accordance with the terms of said contract, or otherwise or at all; that heretofore and

on or about the 1st day of September, 1905, said Augustus W. Boggs, defendant above named, had failed to complete the work in said contract provided for, in accordance with said contract or within the time therein provided for, and on said last-mentioned date had failed to prosecute said work with such diligence as to insure the completion [9] thereof within the time in said contract provided for, and said defendant, Augustus W. Boggs, was notified of the matters and things last aforesaid, and that said Augustus W. Boggs did thereupon and at all times from and after said 1st day of September, 1905, fail and refuse to take such action as would remedy his default in the performance of the terms of said contract as hereinabove set forth, at all.

That on or about the 4th day of November, 1905, and while said work provided for in said contract, in so far as the same at said time had been done and performed or attempted to be done or performed by the said Augustus W. Boggs, was still in the possession of said last-named person as contractor as aforesaid, and before the same had been completed or delivered to the said United States of America or to any person for it or on its account, either in accordance with the terms of said contract or otherwise, said work, in so far as the same had been at that time done by the said Augustus W. Boggs, and all materials thereon, were, through the neglect, fault and carelessness of said Augustus W. Boggs, completely destroyed by fire.

That thereafter and on or about the 28th day of December, 1905, the said United States of America,

by and through the said Commissioner of Indian Affairs, did, on account and by reason of the failure and refusal of said Augustus W. Boggs to perform the terms of said contract or to complete and turn over said building as therein required, or to remedy the default in the performance of said contract of which he had been notified as hereinabove stated, take possession of the premises and site of said stone mess-hall and kitchen at said Rice Station Indian School, and that ever since said last mentioned date has remained in possession thereof. [10]

That thereafter and pursuant to proceedings regularly had and taken by the said plaintiff, acting by and through the said Commissioner of Indian Affairs, said plaintiff did make and enter into with James H. Owen, of Los Angeles, California, a contract for the construction of said stone mess-hall and kitchen at said Rice Station Indian School in all respects as required by said contract with the said Augustus W. Boggs as hereinabove set forth, except as to the time of the completion thereof, for the sum of Sixteen Thousand Six Hundred ((\$16,600.00) Dollars, which said last-mentioned sum said plaintiff had been required to pay for the purpose of securing the completion of the said work agreed by said Augustus W. Boggs, under and by the terms of said contract with him hereinabove referred to, to be by him completed as aforesaid; that after the 4th day of November, 1905, and prior to the entering into said contract with said James H. Owen as aforesaid, the plaintiff did duly and regularly advertise for bids for the construction of said stone mess-hall and

kitchen in accordance with the same terms and specifications as contained in said contract with said defendant, Augustus W. Boggs; that certain bids were received in response to said advertisements; that of said bids so received, the lowest of all received was the bid of said James H. Owen aforesaid, agreeing to construct said stone mess-hall and kitchen, in all respects as required by said contract with said defendant Augustus W. Boggs, for the said sum of Sixteen Thousand and Six Hundred (\$16,600.00) Dollars, which said sum was a reasonable price to be paid for and was and is the reasonable value of the said construction of said stone mess-hall and kitchen in accordance with the contract with the said James H. Owen.

That by reason of the failure and refusal of said [11] Augustus W. Boggs to construct and complete said structure, as provided for in said contract and in accordance with the terms thereof, said plaintiff was obliged to and did construct and equip a laundry building for use at said Rice Station Indian School at a cost of Four Thousand Three Hundred Thirty-nine and 10/100 (\$4,339.10) Dollars, which said laundry building and the equipment thereof would not have been required had said mess-hall and kitchen been constructed and completed by said Augustus W. Boggs in the manner and within the time provided for in said contract.

That plaintiff, by reason of the failure of said Augustus W. Boggs to furnish all of the labor and materials and do and perform all of the work required under and by the terms of said contract as

aforesaid and within the time therein specified, has been damaged in the sum of Three Thousand Eight Hundred and Ninety-one (\$3,891.00) Dollars, difference between the sum of Twelve Thousand Seven Hundred and Nine (\$12,709.00) Dollars, specified in said contract with the said Augustus W. Boggs as aforesaid, and the sum of Sixteen Thousand Six Hundred (\$16,600.00) Dollars, the sum which said plaintiff has been required to pay for the completion of said work as aforesaid; and has been damaged in the further sum of Fifteen Thousand (\$15,000.00) Dollars in being deprived of the use of said stone mess-hall and kitchen through the delay and failure of said Augustus W. Boggs, as contractor as aforesaid, and his failure to complete the performance of the terms of said contract hereinbefore referred to; and has been damaged in the further sum of Four Thousand Three Hundred Thirty-nine and 10/100 (\$4,339.10) Dollars, cost of constructing and equipping said laundry as aforesaid, rendered necessary by reason of the failure of said Augustus W. Boggs to complete said stone mess-hall and kitchen as aforesaid [12] and has been damaged in the further and additional sum of Seven Thousand Eight Hundred Ninety-five and 40/100 (\$7,895.40) Dollars, the amount paid by said plaintiff to said defendant, Augustus W. Boggs, in accordance with said contract, as hereinbefore alleged.

Wherefore, plaintiff prays judgment against said defendants, for the sum of Four Thousand Three Hundred Fifty-six and 24/100 Dollars (\$4,356.24) together with interest thereon from the 10th day of

June, 1905; and

For the further sum of Three Thousand Five Hundred Thirty-nine and 16/100 Dollars (\$3,539.16) together with interest thereon from the 21st day of July, 1905; and

For the further sum of Four Thousand Three Hundred Thirty-nine and 10/100 Dollars (\$4,339.10), cost of erecting and equipping laundry as aforesaid; and

For the further sum of Fifteen Thousand (\$15,000.00) Dollars, damages occasioned by the delay of said Augustus W. Boggs, contractor, as aforesaid; and

For the further sum of Three Thousand Eight Hundred Ninety-one (\$3,891.00) Dollars, difference between the agreed cost of said structure in said contract of Augustus W. Boggs and the cost of completing the same by plaintiff as aforesaid; and

For costs of this action.

OSCAR LAWLER,
United States Attorney. [13]

Exhibit "A" [to Complaint].

1—002 b.

BOND.

KNOW ALL MEN BY THESE PRESENTS,
That we, Augustus W. Boggs, of Riverside, County of Riverside and State of California, principal, and The United States Fidelity & Guaranty Company, a corporation of Baltimore, Maryland, sureties, are held and firmly bound unto the United States of America in the sum of Six Thousand five hundred

dollars (\$6500.00), lawful money of the United States, for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, and assigns, for and in the whole, jointly and severally, firmly by these presents.

Sealed with our seals, attested by our signatures, at San Francisco, Cal., this 11th day of March in the year of our Lord one thousand nine hundred and five.

THE NATURE OF THIS OBLIGATION IS SUCH, that if the said Augustus W. Boggs, his heirs, executors, administrators, and assigns, or any of them, shall and do in all things well and truly observe, perform, fulfill, accomplish, and keep all and singular the covenants, conditions, and agreements whatsoever, which on the part of the said Augustus W. Boggs, his heirs, executors, administrators, and assigns, are, or ought to be, observed, performed, fulfilled, accomplished, and kept, comprised or mentioned in certain articles of agreement bearing date [14] the 23d day of February one thousand nine hundred and five, between the United States of America, and the said Augustus W. Boggs, concerning the furnishing and delivering of the necessary labor and materials to construct and complete a stone mess-hall and kitchen at Rice Station School, Ariz., according to the true intent and meaning of said articles of agreement, then the above obligation

vs. The United States of America.

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to be void; otherwise, to remain in full force and virtue.

AUGUSTUS W. BOGGS. [Seal]
THE UNITED STATES FIDELITY &
GUARANTY COMPANY,

By JOHN H. ROBERTSON,

Its Attorney in Fact. [Seal]

Signed, sealed, and delivered in the presence of—

J. J. KELLOGG.

SADIE M. PALMER.

WILHELMINA KOEHLER.

T. J. THURSTON. [15]

JUSTIFICATION OF ATTORNEY IN FACT.

State of California,

City and County of San Francisco,—ss.

On this 11th day of March, A. D. 1905, before me personally appeared John H. Robertson, Attorney in Face of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Augustus W. Boggs as surety thereon, and who, being by me duly sworn, deposes and says that he resides in the City and County of San Francisco, in the State of California; that he is the Attorney in fact of the said United States Fidelity and Guaranty Company, duly appointed and designated as such by Power of Attorney bearing date the 20th day of February, A. D. 1904, a certified copy of which is on file with the General Land Office at Washington, D. C., and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of

the State of Maryland; that said Company has complied with the provisions of the Act of Congress approved August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Augustus W. Boggs is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Attorney in fact for said Company; and that to the best knowledge and belief of *affiant*, the assets of said Company, unencumbered and liable to execution, exceeds its claims, debts, and liabilities of every nature whatsoever, by more than the sum of One Million Seven Hundred Thousand Dollars (\$1,700,000).

Deponent further says that John H. Robertson, residing at San Francisco, State of California, has been duly [16] appointed as the Agent of said Company to accept service of process against said Company in the Northern Judicial District of California, and that Charles Monroe, of Los Angeles, said State, has been duly appointed as such agent in and for the Southern Judicial District of California, and that each is authorized to enter an appearance in behalf of said Company in any action, suit or proceeding brought against it in the Judicial District of that State in which he resides respectively.

(Signed) JOHN H. ROBERTSON,
Attorney in Fact.

Sworn to and acknowledged before me and subscribed in my presence this 11 day of March, 1905.

[Seal] (Signed) M. J. CLEVELAND,
Notary Public, in and for the City and County of
San Francisco, State of California.

CERTIFICATION.

I, Jesse M. Whited of San Francisco, California, Resident Assistant Secretary of the United States Fidelity and Guaranty Company, a corporation created and existing under the laws of the State of Maryland, do hereby certify that John H. Robertson of San Francisco, California, is the Attorney-in-Fact of said Company, and that the said John H. Robertson was fully authorized under Power of Attorney heretofore granted him to sign the name of said Company and to affix its corporate seal as Surety to the bond in the penal sum of Sixty-five Hundred Dollars (\$6500.00) required to be given by one Augustus W. Boggs; and that the signature of the said John H. Robertson to the said bond is in the genuine handwriting of the said John H. Robertson.

Given under my hand and the seal of said Company, this 11th day of March, 1905.

(Signed) JESSE M. WHITED,
Resident Assistant Secretary. [17]

[Endorsed]: No. 1399. In the Circuit Court of the United States, for the Southern District of California, Southern Division. United States of America, Plaintiff, vs. Augustus W. Boggs and The United States Fidelity & Guaranty Co., of Baltimore, Md. (a Corporation), Defendants. Complaint.

24 *The United States Fidelity etc. Co.*

Filed Mar. 12, 1908. Wm. M. Van Dyke, Clerk.
Chas. N. Williams, Deputy. [18]

[Summons.]

UNITED STATES OF AMERICA.

*Circuit Court of the United States, Ninth Circuit,
Southern District of California, Southern Di-
vision.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUGUSTUS W. BOGGS and THE UNITED
STATES FIDELITY & GUARANTY COM-
PANY OF BALTIMORE, MARYLAND (a
Corporation),

Defendant.

Action brought in the said Circuit Court, and the
Complaint filed in the office of the Clerk of said
Circuit Court, in the City of Los Angeles,
County of Los Angeles.

The President of the United States of America,
Greeting, to Augustus W. Boggs and The United
States Fidelity & *Guaranty* of Baltimore, Mary-
land, a Corporation:

You are hereby required to appear in an action
brought against you by the above-named plaintiff,
in the Circuit Court of the United States, Ninth Cir-
cuit, in and for the Southern District of California,
Southern Division, and to file your plea, answer or
demurrer, to the complaint filed therein (a certified

copy of which accompanies this summons), in the office of the Clerk of said Court, in the City of Los Angeles, County of Los Angeles, within twenty days after the service on you of this summons, or judgment by default will be taken against you. [19]

The said action is brought to recover the sum of \$4,356.24, together with interest thereon from the 10th day of June, 1905, and for the further sum of \$3,539.16, together with interest thereon from the 21st day of July, 1905; and for the further sum of \$4,339.10, cost of erecting and equipping laundry and for the further sum of \$15,000.00 damages occasioned by the delay of Augustus W. Boggs, Contractor; and for the further sum of \$3,891.00, difference between the agreed cost of the structure in the contract of Augustus W. Boggs and the cost of completing the same by plaintiff, which sums as plaintiff alleges are due from defendants by reason of the failure and refusal of defendant, Augustus W. Boggs to perform the terms of a certain contract made and entered into by the plaintiff with said Augustus W. Boggs; plaintiff also prays judgment for costs of this action; all of which more fully appears in the complaint on file herein, to which you are hereby expressly referred, and if you fail to appear and plead, answer or demur, as herein required, your default will be entered and the plaintiff will apply to the court for the relief demanded in the complaint.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, this 19th day of March in the year of our Lord one thousand nine hundred and eight and of our Independence the

26 *The United States Fidelity etc. Co.*

one hundred and thirty-second.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk. [20]

United States Marshal's Office,
Southern District of California.

I hereby certify, that I received the within writ on the 20 day of Mar., 1908, and personally served the same on the Mar. 20 & Apl. 22 day of 1908, by delivering to and leaving with Frank Kelcey, Agt. U. S. Fidelity & Guaranty Co. of Balto. Md. & Augustus W. Boggs said *defendant* named therein, personally, at the County of Los Angeles in said District, a certified copy thereof, together with a copy of the Complaint, certified to by E. H. Owen attached thereto.

LEO V. YOUNGWORTH,

U. S. Marshal.

By J. F. Durlin,

Deputy.

Los Angeles, Apl. 22, 1908.

[Endorsed]: Original. Marshal's Doc. No. 1169. No. 1399. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. United States of America, Plaintiff, vs. Augustus W. Boggs and The United States Fidelity & Guaranty Company of Baltimore, Maryland (a Corporation), Defendants. Summons. Oscar Lawler, United States Attorney, Plaintiff's Attorney. Filed Apr. 23, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [21]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUGUSTUS W. BOGGS and THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND (a Corporation),

Defendants.

Separate Answer of Defendant The United States Fidelity & Guaranty Company of Baltimore, Maryland.

Comes now the defendant The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, one of the defendants in the above-entitled action, and for its separate answer to the complaint in said action, admits and denies the allegations thereof, as follows:

I.

Defendant admits the allegations of paragraph I of said complaint.

II.

Defendant has no knowledge or information sufficient to form a belief as to whether or not on or about the 23d day of February, 1905, the said United States of America entered into a contract in writing, or otherwise, with said Augustus W. Boggs, whether as alleged in paragraph II of said complaint or otherwise, or as to whether or not said contract contained

the provisions or agreements set forth in said paragraph II, and therefore denies the same.

III.

Defendant admits the making of the bond, copy whereof [22] is attached to the complaint herein and marked Exhibit "A," but defendant has no knowledge or information sufficient to form a belief as to whether or not said bond or undertaking was a part of said transaction or contract described in paragraph II of said complaint, or as to whether or not said alleged contract was the contract to secure the faithful performance of which said undertaking was given, whether as alleged in lines 16 to 31, inclusive, on page 7 of said complaint, or otherwise; and therefore denies the same.

IV.

Defendant has no knowledge or information sufficient to form a belief, as to whether thereafter, or at all, said Augustus W. Boggs did commence operations under or pursuant to said alleged contract, or furnish materials or to do work in purported compliance therewith; or as to whether or not in accordance with the terms of said alleged contract, or otherwise, or as said alleged work progressed, or at the times stated on page 8 of said complaint, or at all, plaintiff paid to said defendant, Augustus W. Boggs, the sums of money alleged on page 8 of said complaint, or any sums whatsoever; or as to whether or not said sums or any part thereof have been returned to plaintiff; or as to whether or not said Augustus W. Boggs, or anyone on his behalf, did not furnish labor or materials, or perform work, or com-

plete work, or turn over to plaintiff the stone mess-hall and kitchen at Rice Station Indian School, either in accordance with said alleged contract or otherwise, whether as alleged on page 8 of said complaint, or otherwise; or as to whether or not said Augustus W. Boggs failed to complete said alleged work in accordance with said alleged contract or otherwise, or failed to prosecute said alleged work with such [23] diligence as to insure the completion thereof within the time in said alleged contract provided; or as to whether or not said Augustus W. Boggs was notified of the matters and things set forth in said complaint, or as to whether or not said Augustus W. Boggs thereupon or at all refused to take such action as would remedy said alleged default in the performance of the terms of said alleged contract; whether as alleged in said complaint beginning with line 1 on page 8 thereof to and including line 11 on page 9 thereof, or otherwise; and therefore denies each and all of the allegations therein contained.

V.

Defendant has no knowledge or information sufficient to form a belief as to whether or not the work alleged to have been provided for in said alleged contract was destroyed by fire, whether as alleged in said complaint from line 12 to line 24, inclusive, on page 9 thereof, or otherwise; and therefore denies said allegations.

VI.

Defendant has no knowledge or information sufficient to form a belief as to whether or not the plain-

tiff took possession of the premises and site of said stone mess-hall and kitchen or has remained in possession thereof, whether as alleged in said complaint from line 25 on page 9 thereof to and including line 3 on page 10 thereof, or otherwise and therefore denies the same.

VII.

Defendant has no knowledge or information sufficient to form a belief as to whether or not plaintiff made and entered into a contract with James H. Owen of Los Angeles, California, for the construction of a stone mess-hall and kitchen at Rice Station Indian School, whether as alleged in said complaint [24] from line 4 on page 10 thereof to and including line 34 on said page, or otherwise; and therefore denies the same.

VIII.

Defendant has no knowledge or information sufficient to form a belief as to whether or not plaintiff was obliged to or did construct or equip a laundry building for use at said Rice Station Indian School, by reason of the failure of said Augustus W. Boggs to perform said alleged contract or as to whether or not said laundry building or equipment thereof would have been required had said Augustus W. Boggs performed his said alleged contract; whether as set forth in lines 1 to 12, inclusive, on page 11 of said complaint, or otherwise; and therefore denies the same.

IX.

Defendant has no knowledge or information sufficient to form a belief as to whether or not plaintiff

has been damaged by reason of the matters and things alleged in said complaint, whether as therein alleged or otherwise; and therefore denies that plaintiff has been damaged either in the sums alleged in said complaint or in any sums or amounts whatsoever.

Wherefore, defendant prays that plaintiff take nothing by its said action; and for its costs and disbursements herein.

PERCY R. WILSON,

Attorney for Defendant The United States Fidelity
& Casualty Company of Baltimore, Maryland.

[25]

State of California,
County of Los Angeles,—ss.

Percy R. Wilson, being first duly sworn, deposes and says that he is the attorney for The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters and things therein stated on information and belief, and as to such matters, that he believes it to be true; that the reason this verification is not made by an officer of said defendant is that all of said officers are absent from the county of Los Angeles, State of California, wherein resides affiant, defendant's said attorney.

PERCY R. WILSON.

Subscribed and sworn to before me this 1st day of July, 1908.

[Seal] WALTER J. LUNDEY,
Notary Public in and for the County of Los Angeles, State of California.

Due personal service of the within Answer is hereby admitted and consent given to the filing of the same as though said Answer had been served and filed within the time originally prescribed by law.

OSCAR LAWLER,
Attorney for Plaintiff.

[Endorsed]: No. 1399. In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division. United States of America, Complainant, vs. Augustus W. Boggs et al., Defendant. Separate Answer of Defendant the United States Fidelity & Guaranty Co. of Baltimore, Maryland. Filed Jul. 1, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Percy R. Wilson, 402-406 Wilcox Building, Telephones Home 8208, Main 731, Los Angeles, Cal., Attorney for said Deft. [26]

In the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

No. 1399.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
AUGUSTUS W. BOGGS et al.,
Defendants.

Default [of Augustus W. Boggs].

In this action, the defendant Augustus W. Boggs having been duly and regularly served with process, and having failed to appear and file his plea, answer, or demurrer, in conformity with the requirements of the summons, and the legal time for pleading, answering, or demurring having expired, and no plea, answer, or demurrer having been filed, now, on the written request of the plaintiffs' attorney filed in the case, the default of said Augustus W. Boggs in the premises is hereby duly entered, according to law.

Attest my hand and the seal of said Circuit Court this 25th day of September, A. D. 1908.

[Seal]

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: No. 1399. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. United States of America, vs. Augustus W. Boggs et al. Default. Filed Sep. 25, 1908. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [27]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1399—Civil.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUGUSTUS W. BOGGS and THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND (a Corporation),

Defendants.

Stipulation Waiving Trial by Jury.

It is hereby stipulated by and between the United States of America, plaintiff above named, and The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, one of the defendants in the above-entitled action, that a trial by jury may be, and the same is, hereby waived, and that the said action may be tried by the Court without a jury.

Dated this 8th day of April, 1910.

A. I. McCORMICK,

United States Attorney and Attorney for Plaintiff.

GRAY, BARKER, BOWEN, ALLEN, VAN
DYKE & JUTTEN,

Attorneys for Defendant, The United States Fidelity & Guaranty Company of Baltimore, Maryland, a Corporation.

[Endorsed]: (Original.) No. 1399—Civil. In the Circuit Court of the United States, Ninth Cir-

cuit, for the Sou. Dist. of California, Sou. Division.
The United States of America, Plaintiff vs. Augustus W. Boggs et al., Defendants. Stipulation Waiving Trial by Jury. Received Copy of Within *Stipulation* this 8th Day of April, A. D. 1910. Gray, Barker, Bowen, Allen, Van Dyke & Jutten, Attorneys for Deft., U. S. Fidelity and Guaranty Co., a Corporation. [28]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUGUSTUS W. BOGGS, and THE UNITED STATES FIDELITY & GUARANTY COMPANY OF BALTIMORE, MARYLAND (a Corporation),

Defendants.

**Amendment to the Separate Answer of Defendant
United States Fidelity & Guaranty Company of
Baltimore, Maryland.**

Comes now the defendant, the United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, one of the defendants in the above-entitled action, and by leave of Court first had and obtained, in addition to the allegations and denials contained in its separate answer on file herein, for a further answer, defense and counterclaim, alleges as follows, to wit:

I.

That as said defendant is informed and believes

and therefore alleges, shortly after the 4th day of November, 1905, the date of the partial destruction of the building referred to in the complaint herein by fire, the defendant, Augustus W. Boggs, commenced the reconstruction of said building in accordance with the terms and provisions of the contract, plans and specifications mentioned in said complaint. That the said Boggs proceeded with the aforesaid work of reconstruction and the preliminary work necessary there about until on or about the 28th day of December, 1905, on or about which date, plaintiff, by its duly authorized officers and agents, notified said Boggs and his representatives who were then and there on the premises aforesaid to leave said premises, to vacate the Indian Reservation aforesaid, and to desist from further prosecuting [29] the work of construction of said building.

That thereupon, by reason of said notice, said Augustus W. Boggs and his agents and representatives immediately vacated said premises and ceased the aforesaid work of construction. That said plaintiff and its officers and agents, on or about said date, refused to permit said Boggs and his agents and representatives to proceed further about said work of construction, and said plaintiff and its officers and agents did, on or about said date, prevent the said Augustus W. Boggs and his agents and representatives from proceeding further with the construction of said building.

That on or about said 28th day of December, 1905, and at the time said Boggs was prevented as afore-

said from proceeding with the construction of said building, and was compelled by plaintiff as aforesaid to leave said premises, he, the said Boggs, had belonging to him and located upon said premises for use in the construction of said building, building materials of the value of \$5,936.86; also picks, shovels and other implements of the value of \$25.50. That all of said materials, tools and implements as aforesaid were confiscated and seized by plaintiff, although the same belonged to the defendant Boggs as aforesaid.

That no part of the said materials, tools and implements as aforesaid has ever been returned to the defendant Boggs or to this defendant, nor has any part of the value thereof ever been paid to said defendant or to this defendant; but that on the contrary, all of said materials, tools and implements as aforesaid were kept, retained and used by plaintiff in and about the subsequent construction of said building by plaintiff or by its agents, employees and contractees.

That between the date of the partial destruction of said building by fire as aforesaid, and the date of the aforesaid [30] prevention by plaintiff of the completion of said work by the said Boggs, the said Boggs expended the sum of \$934.03 for labor in and about the reconstruction of said building, and in and about the preliminary work for such reconstruction, and that no part of the said sum of \$934.03 has been paid, either to the said Boggs or to this defendant.

Wherefore this defendant prays that plaintiff take

nothing against it by its action. That in case any recovery is had against said defendant herein, the sum of Six Thousand Eight Hundred Ninety-six and 39/100 Dollars (\$6,896.39) be allowed and set off in favor of said defendant against plaintiff, and for said defendant's costs and disbursements herein.

GRAY, BARKER, BOWEN, ALLEN, VAN
DYKE & JUTTEN,

Attorneys for Defendant, United States Fidelity &
Guaranty Company of Baltimore, Maryland.

State of California,
County of Los Angeles,—ss.

William A. Bowen, being by me first duly sworn,
deposes and says:

That he is one of the attorneys for the United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, one of the defendants in the within-entitled action; that he has read the foregoing amendment to said defendant's answer and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true; and that this verification is made on behalf of said defendant by affiant for the reason that there is no officer of said defendant in the County of Los Angeles, [31] in which county the herein named attorneys for said defendant reside and have their office.

WILLIAM A. BOWEN.

Subscribed and sworn to before me this 15th day of April, 1910.

[Seal]

DAISY ROBERTS,

Notary Public in and for the County of Los Angeles, State of California.

We certify that in our opinion the foregoing amendment to the answer of said defendant is well founded in point of law.

GRAY, BARKER, BOWEN, ALLEN, VAN
DYKE & JUTTEN,

Attorneys for Defendant, United States Fidelity & Guaranty Co.

[Endorsed]: Original. No. 1399. In the Circuit Court of the United States, 9th Circuit, Southern District of California. United States of America, Plaintiff, vs. Augustus W. Boggs and The United States Fidelity & Guaranty Co., Defendants. Amendment to the Separate Answer of Defendant United States Fidelity & Guaranty Co. of Baltimore, Maryland. Due service of the within acknowledged this 15th day of April, 1910. A. I. McCormick and G. Ray Horton, Attorneys for Plaintiff. Filed Apr. 15, 1910. Wm. M. Van Dyke, Clerk. Gray, Barker, Bowen, Allen, Van Dyke & Jutten. Rooms 1 to 10, Los Angeles National Bank Building, Los Angeles, Cal. Telephones: Home 685, Sunset Main 685. Attorneys for Defendant, U. S. F. & G. Co. [32]

*In the Circuit Court of the United States, Ninth
Circuit, Southern District of California, South-
ern Division.*

No. 1399—Civil.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUGUSTUS W. BOGGS and THE UNITED
STATES FIDELITY AND GUARANTY
COMPANY OF BALTIMORE, MARY-
LAND (a Corporation),

Defendants.

Findings of Fact and Conclusions of Law.

This cause came on regularly for trial on the 13th day of April, one thousand nine hundred and ten, and was tried before the Court without a jury, a trial by jury having been expressly waived by a stipulation in writing signed by the attorneys of the respective parties and filed with the Clerk of the above-mentioned Court, the defendant The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, having duly appeared in said action and filed its answer therein and the defendant Augustus W. Boggs having failed and refused to appear in said action, and his default having been duly filed and entered in said action; said cause was tried upon the complaint of plaintiff and the complaint of plaintiff as amended during the course of the said trial, leave of Court so to amend said complaint having first

been duly obtained, and the answer of said The United States Fidelity and Guaranty Company of Baltimore, [33] Maryland, a corporation, and the answer of said The United States Fidelity and Guaranty Company of Baltimore, Maryland, as amended during the course of said trial, leave of Court so to amend having first been duly obtained; A. I. McCormick, Esq., the United States Attorney, and G. Ray Horton, Esq., Assistant United States Attorney, appearing as attorneys for the plaintiff, and Messrs. Gray, Barker, Bowen, Allen, Van Dyke & Jutten and William A. Bowen, Esq., appearing as attorneys for the defendant, The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation; witnesses having been sworn and examined and the Court having duly heard the proof and evidence, oral and documentary, introduced in the cause on behalf of the respective parties, and having considered the same and the cause having been closed and after argument duly submitted to the Court for its decision; the Court now files its decision in writing and finds facts as follows, to wit:

[Findings.]

I.

That each and all of the statements and allegations contained in paragraph 1 of plaintiff's complaint in this action are true.

II.

That on the 23d day of February, 1905, the United States of America, pursuant to proceedings regularly had and taken in that behalf by the Depart-

ment of the Interior of the said United States, acting by and through the then Acting Commissioner of Indian Affairs, C. F. Larrabee, made and entered into a contract in writing with Augustus W. Boggs, one of the defendants in this action, under and by the terms of which said contract said Augustus W. Boggs agreed, for a consideration of the unit price of Twelve Thousand Seven *D*undred and Nine (\$12,709) Dollars, to furnish all the labor and materials and to do and perform all the work required to construct and complete a stone mess-hall and kitchen at the Rice Station Indian School in the Territory of [34] Arizona, in strict and full accordance with the terms of a certain advertisement in said contract set forth and with the requirements of certain drawings, plans and specifications, copies of which were attached to and made a part of said contract and embodied therein, and to complete said mess-hall and kitchen in strict and full accordance with the said contract and the said plans, drawings and specifications, and to turn the said stone mess-hall and kitchen so completed over to the said United States of America, acting through and by said Acting Commissioner of Indian Affairs as aforesaid, on or before the 1st day of September, 1905.

III.

That on the 11th day of March, 1905, the defendant Augustus W. Boggs and the defendant The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, as aforesaid, made and entered into a bond and undertaking in writing to secure the faithful performance by the

said Augustus W. Boggs of the aforesaid contract between the United States of America and Augustus W. Boggs; that Exhibit "A," attached to plaintiff's complaint, is a true and correct copy of said bond and undertaking; that said bond and undertaking in writing so made and entered into was a part of the transaction of making and entering into said contract between said Augustus W. Boggs and the United States of America, dated the 23d day of February, 1905, and hereinbefore referred to.

IV.

That on the 27th day of March, 1905, the said contract and bond were duly and lawfully approved by the then Secretary of the Interior of the United States of America.

V.

That thereafter, to wit, on or about the 12th day of April, 1905, and prior to the 1st day of September, 1905, said [35] Augustus W. Boggs commenced operations on the construction of the said mess-hall and kitchen at the said Rice Station Indian School and furnished certain materials and did certain work; that the materials so furnished and the work so done were not, nor was either of them, in compliance with or pursuant to the terms of said contract, and the said defendant Augustus W. Boggs did not at any time complete said mess-hall and kitchen in strict and full accordance with, or substantially, or at all, in accordance with, said contract, nor with the plans, drawings and specifications that were a part of said contract.

VI.

That said defendant Augustus W. Boggs wilfully, intentionally and fraudulently disregarded the terms of his contract with plaintiff from the beginning of his operations thereunder, and continued in such disregard, as aforesaid, at all times up to and including the 28th day of December, 1905, and at all times thereafter.

VII.

That after the said contract and bond became effective and prior to the commencement of the woodwork necessary to the construction of the said stone mess-hall and kitchen, to wit, on or about the 31st day of May, 1905, the defendant, Augustus W. Boggs, employed an agent, one J. C. Kincaid, as his foreman, to do and have done the woodwork construction on the said stone mess-hall and kitchen, and then gave him certain drawings for his instruction in said work other than the plans, drawings and specifications heretofore mentioned as a part of said contract; that as such agent of the defendant Augustus W. Boggs, the said Kincaid, following the specific directions and instructions theretofore given by the said Augustus W. Boggs, built as a part of the roof of said stone mess-hall and kitchen, a certain large wooden [36] truss; that the said Kincaid did not build and construct said truss in accordance with the plans, drawings and specifications referred to in the aforementioned contract, but according to a detail drawing essentially different therefrom, made by the defendant Augustus W. Boggs, and delivered by him to the said Kincaid with in-

structions to follow the said detail drawings instead of the said plans, drawings and specifications; that the said Kincaid thereafter built certain purlins in the roof of said stone mess-hall and kitchen in accordance with the aforesaid detailed drawing instead of the plans, drawings and specifications specified in said contract (said detailed drawing being essentially different therefrom), in this instance, also, following the directions of the said defendant, Augustus W. Boggs; that it was not possible for defendant, Augustus W. Boggs, through his said agent, or at all, to do the woodwork in the manner and with the materials specified in the plans, drawings and specifications aforesaid, because the defendant, Augustus W. Boggs, did not at any time furnish the said Kincaid with the necessary and required materials; that the work done for the defendant, Augustus W. Boggs, by the said Kincaid was performed with the knowledge of said defendant, Augustus W. Boggs, and in such manner as was necessitated by the materials furnished by defendant, Augustus W. Boggs, without regard to said contract and said plans, drawings and specifications; that the defendant, Augustus W. Boggs, was at all times without authority to proceed in the aforesaid woodwork construction on any other plans, drawings and specifications than those specified in the said contract; that no wall-plates and no stay-bolts were used in the construction of said stone mess-hall and kitchen, or at all, as required in said plans, drawings and specifications; that one foot-bolt only was used at the end of each truss, [37] while the

plans, drawings and specifications aforesaid called for two foot-bolts at each end, that the work that the said Kincaid did as aforesaid on said stone mess-hall and kitchen, was not done in accordance with the plans, drawings and specifications specified in said contract, but constituted and was a wilful and substantial departure from said contract and said plans, drawings and specifications, a part thereof as aforesaid.

VIII.

That on the said 28th day of December, 1905, the plaintiff, acting under the terms of the contract aforesaid, by means and on account of the wilful and intentional failure and refusal of the said Augustus W. Boggs to perform the terms of said contract, and to complete and turn over said building as therein required, took possession of the premises and site of said stone mess-hall and kitchen at said Rice Station Indian School, and directed the said defendant, Augustus W. Boggs, to leave the Indian Reservation where said building had been located.

IX.

That on the 10th day of June, 1905, plaintiff paid, and caused to be paid, to the said Augustus W. Boggs, and the said Augustus W. Boggs received from plaintiff, in advance of said unit price of \$12,709, and on account thereof, the sum of Four Thousand Three Hundred and Fifty-six Dollars and Twenty-four Cents (\$4,356.24), and on the 21st day of July, 1905, the said plaintiff paid to the said Augustus W. Boggs, and the said Augustus W. Boggs received the further sum of Three Thousand

Five Hundred and Thirty-nine Dollars and Sixteen Cents (\$3,539.16); that both of said payments were paid as aforesaid pursuant to the terms of said contract, and that both of said payments make a total of Seven Thousand Eight Hundred and Ninety-five Dollars and Forty Cents (\$7,895.40). [38]

X.

That no part of said sum of Seven Thousand Eight Hundred and Ninety-five Dollars and Forty Cents (\$7,895.40) has been repaid or returned to said plaintiff; that said Augustus W. Boggs now has, and ever since the payment of the said sum to him, as aforesaid, has had said sum of Seven Thousand Eight Hundred and Ninety-five Dollars and Forty Cents (\$7,895.40) and the use and benefit of the same.

XI.

That said Augustus W. Boggs did not, nor did anyone on his behalf, furnish all of the labor and materials, nor did the defendant do or perform all of the work required to construct and complete a stone mess-hall and kitchen at said Rice Station Indian School as provided for by the terms of his said contract as aforesaid, nor did he on or before the 1st day of September, 1905, or at all, complete the work provided for in said contract, nor did he at or before said last-mentioned date, or at all, turn over to the said plaintiff the said stone mess-hall and kitchen at the said Rice Station Indian School either in accordance with the terms of his said contract, otherwise or at all.

XII.

That on the 1st day of September, 1905, said

Augustus W. Boggs had failed to complete the work in said contract provided for in accordance with said contract or within the time therein provided for.

XIII.

That at all times from and after said 1st day of September, 1905, the said Augustus W. Boggs failed to take such action as would remedy his default in the performance of the terms of said contract as hereinabove found. [39]

XIV.

That on or about the 3d day of October, 1905, the said defendant, Augustus W. Boggs, caused to be insured, and insured against loss by fire the said stone mess-hall and kitchen; that is to say, his interest in the same.

XV.

That on or about the 27th day of October, 1905, the plaintiff rejected the work done, materials furnished and building thereby and thereof constructed as previously offered for acceptance by the said Augustus W. Boggs.

XVI.

That on the 4th day of November, 1905, while said work, material and structure were still in the possession of said Augustus W. Boggs, said work, material and structure were completely destroyed by fire.

XVII.

That afterwards, about the 28th day of December, 1905, plaintiff did, on account and by reason of the failure and refusal of said Augustus W. Boggs to perform the terms of said contract or to complete

and turn over said building as thereunder required, or to remedy the default in performance of said contract as hereinbefore indicated, take possession of the premises and site of said stone mess-hall and kitchen at said Rice Station Indian School, and ever since that time plaintiff has remained continuously in possession thereof.

XVIII.

That Augustus W. Boggs, shortly after the 4th day of November, 1905, did not in accordance with the terms and provisions of the aforesaid contract, commence the reconstruction, or any construction, of said stone mess-hall and kitchen; that any work of reconstruction, or any work, done after said date, [40] was outside of said contract and without the consent of plaintiff.

XIX.

That on the 28th day of December, 1905, plaintiff, by its duly authorized officers and agents, notified Augustus W. Boggs and his representatives who were then and there on the premises aforesaid, to leave said premises, to vacate the Indian Reservation aforesaid and to desist from doing any work on which they were then and there engaged; that thereupon said Augustus W. Boggs and his agents and representatives immediately vacated said premises and ceased all work on said premises.

XX.

That on the 28th day of December, 1905, and at the time said Augustus W. Boggs was ordered to leave said premises, the said Augustus W. Boggs had belonging to him and located upon said premises cer-

tain building materials, tools and implements, of the reasonable value of \$2,418.58; that all of said materials, tools and implements, as aforesaid, were confiscated and seized by plaintiff, although the same then and there belonged to Augustus W. Boggs, as aforesaid.

XXI.

That no part of the said materials, tools and implements, as aforesaid, were ever returned to the defendants herein, or either of them, nor was any part of the value thereof ever paid to the defendants or either of them; that on the contrary all of said materials, tools and implements, as aforesaid, were kept, retained and used by the plaintiff.

XXII.

That Augustus W. Boggs did not well and truly observe, perform, fulfill, accomplish and keep all and singular the covenants, conditions and agreements whatsoever, which, on his part, should have been observed, performed, fulfilled, accomplished [41] and kept, comprised and mentioned in the aforesaid contract bearing date of the 23d day of February, one thousand nine hundred and five, between the plaintiff and himself, in that he wilfully, knowingly, purposely, fraudulently and intentionally failed, neglected and refused to erect a structure in accordance with the plans and specifications that were a part of his contract aforesaid.

XXIII.

That it is not true that said plaintiff did not comply with the terms, covenants and agreements in said contract specified, but it is true that plaintiff

has duly and regularly performed all of the terms, conditions and obligations of said contract on its part to be performed; it is not true that plaintiff, without the knowledge or consent of said defendants, or either of them, or at all, or in violation of the terms of said contract, or in violation of the terms or conditions of said bond, or at all, changed or abrogated the terms of said contract in any particular; it is not true that said plaintiff, without the knowledge or consent of the defendants, or either of them, or at all, extended the time of the performance of said contract for the said Augustus W. Boggs, otherwise or at all; it is not true that the failure and delay of the said Augustus W. Boggs to complete the said mess-hall and kitchen within the period of time prescribed by said contract, was by or with the consent of the said plaintiff; it is not true that the said plaintiff without the knowledge or consent of the defendants or either of them, further violated, or violated at all, the terms or conditions of said contract either by building or causing to be built the said stone mess-hall and kitchen on or along different lines than those provided for in said contract, or that plaintiff caused said stone mess-hall and kitchen to be built [42] or constructed in violation of or contrary to the plans, drawings and specifications made a part of said contract; it is not true that under or pursuant to the directions of plaintiff in the construction of said stone mess-hall and kitchen by said defendant Augustus W. Boggs, said work was improperly done, or that plaintiff caused the said stone mess-hall and kitchen to be

constructed by said defendant Augustus W. Boggs improperly or in violation of the terms and specification agreed upon in said contract; it is not true that through the act, or any act, of plaintiff herein, the consideration for the bond mentioned in said complaint has wholly failed, or failed at all, or that the same is null and void and without effect.

XXIV.

That on or about the 8th day of December, 1906, plaintiff, acting by and through the then Commissioner of Indian Affairs, advertised for bids to be received on or before January 16, 1907, for the construction of a stone mess-hall and kitchen at said Rice Station Indian School; that certain bids were received in response to said advertisement; that of said bids so received, the lowest received was the bid of one James H. Owen, of Los Angeles, California; that on the 22d day of January, 1907, in pursuance of said bid said James H. Owen entered into a written contract with plaintiff for the construction of a stone mess-hall and kitchen for the sum of \$16,600 on the site occupied by the building theretofore constructed by the said Augustus W. Boggs; that the said sum of \$16,600 was paid by the plaintiff to the said James H. Owen under said contract for the construction of said building thereunder in lieu of the stone mess-hall and kitchen agreed to be built for and delivered to plaintiff by said Augustus W. Boggs under and by the terms of [43] said contract with him, heretofore referred to, to be by him completed as aforesaid; that the said James H. Owen constructed the building aforesaid according to the

contract between himself and plaintiff, and in accordance with the plans and specifications thereunto attached; that the reasonable value of the structure built by the said James H. Owen under the contract, plans and specifications between himself and plaintiff, was \$16,600 at the time the same was constructed; that the aforesaid contract, plans and specifications between plaintiff and the said James H. Owen were different in many substantial respects from the contract, plans and specifications between plaintiff and the said Augustus W. Boggs; that the building required to be erected and actually erected by the said James H. Owen under his contract, plans and specifications, was different in many substantial respects from the building required to be erected by the said Augustus W. Boggs under his contract, plans and specifications; that \$1,200 of the contract price required to be paid and actually paid to the said James H. Owen under his contract, applied to work wholly outside of the work provided for in the contract between the said Augustus W. Boggs and plaintiff; that \$500 of the aforesaid contract price required to be paid and actually paid to the said James H. Owen under his contract by plaintiff was for work and materials in excess of what was embraced and included in the contract between the said Augustus W. Boggs and plaintiff; that the cost of labor and building supplies was different in 1907 from their cost in 1905, and that plaintiff waited from the 28th day of December, 1905, to the 22d day of January, 1907, before entering into a new contract for the construction of said building, and

that by reason of the lapse of time and the changes in prices in the meantime, a comparison between the two contracts furnishes no basis for estimating the plaintiff's damage in this case. [44]

[Conclusions.]

As CONCLUSIONS OF LAW from the foregoing findings, the Court finds that the failure, refusal and neglect of Augustus W. Boggs, as aforesaid, comprised a breach of the said contract and of the obligation of the aforesaid bond and undertaking in writing made and entered into by the defendant, The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, and that by reason thereof the United States is entitled to recover against the said defendants herein as contingent advances on account of said contract (said contract being entire, and the right of defendant Augustus W. Boggs to retain the same after the 1st day of September, 1905, depending upon his performing said contract in strict and full compliance with the terms thereof), the sum of Four Thousand Three Hundred and Fifty-six Dollars and Twenty-four Cents (\$4,356.24), and the further sum of Three Thousand Five Hundred and Thirty-nine Dollars and Sixteen Cents (\$3,539.16), together with the further sum of Twenty-six Hundred and Ninety-four Dollars and Thirty-two Cents (\$2,694.32), (which sum of \$2,694.32 is equivalent to interest at seven per cent per annum on said sums of \$4,356.24 and \$3,539.16 from the 1st day of September, 1905, to date of entry of judgment herein), all as damages for the aforesaid breach, aggregating damages in

the sum of Ten Thousand Six Hundred and Twenty-one Dollars and Sixty Thousand Five Hundred and Eighty-nine Dollars and Seventy-two Cents (\$10,589.72); and the Court finds that the defendants Augustus W. Boggs and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, are entitled to be allowed, as a setoff and counter-claim in their favor, the sum of Twenty-four Hundred and Eighteen Dollars and Fifty-eight Cents (\$2,418.58), as the reasonable value of labor and material confiscated by the United States on the 28th day of December, 1905, together with interest thereon [45] at the rate of seven per cent (7%) per annum from said 28th day of December, 1905, in the sum of Seven Hundred and Sixty-eight Dollars and Five Cents (\$768.05), aggregating the sum of Thirty-one Hundred and Eighty-six Dollars and Sixty-three Cents (\$3,186.63), which said sum of \$3,186.63 shall be, and is, hereby set off and credited against the aforesaid sum of \$10,589.72, the difference, to wit, Seventy-four Hundred and Three Dollars and Nine Cents (\$7,403.09), being the amount that the Court finds plaintiff is entitled to recover in this action; provided, however, the liability of the said defendant The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, shall not exceed the sum of Sixty-five Hundred Dollars (\$6,500.00) on account of the damages aforesaid, exclusive of costs of suit, the said sum of \$6,500.00 being the penal amount specified and limited in its said bond and undertaking in writing, as aforesaid;

56 *The United States Fidelity etc. Co.*

and the Court finds that the plaintiff is also, entitled to recover from said defendants, its costs of suit.

It is ordered that judgment be entered in accordance herewith.

Done in open court this 18th day of July, 1910.

OLIN WELLBORN,

Judge.

[Endorsed]: (Original.) No. 1399—Civil. In the Circuit Court of the United States for the Sou. Dist. of California. United States of America, Plaintiff, vs. Augustus W. Boggs and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, Defendants. Findings of Fact and Conclusions of Law. Filed Jul. 18, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [46]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California. Southern Division.

No. 1399—Civil.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUGUSTUS W. BOGGS and THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND (a Corporation),

Defendants.

Judgment.

This cause having come on regularly for trial upon the 13th day of April, 1910, being a day in

the January Term, A. D. 1910, of said Circuit Court of the United States for the Southern District of California, Southern Division, before the Court sitting without a jury, a trial by jury having been expressly waived by a stipulation signed, by the attorneys of the respective parties, filed herein; the defendant The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, having duly appeared in said action and filed its answer herein, and the defendant Augustus W. Boggs having failed and refused to appear in said action and his default having been duly filed and entered herein; said cause having been tried upon the complaint of plaintiff and the complaint of plaintiff as amended during the course of said trial, leave of Court so to amend said complaint having first been duly obtained, and the answer of the said The United States Fidelity and Guaranty Company, of Baltimore, Maryland, a corporation, and the answer of the said The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, as amended during the course of said trial, leave of Court so to amend having first been duly obtained; A. I. McCormick, Esq., the United States Attorney, and G. Ray Horton, Esq., the Assistant United States Attorney, appearing as attorneys for the plaintiff, and Messrs. Gray, Barker, Bowen, Allen, Van Dyke & Jutten [47] and William A. Bowen, Esq., appearing as attorneys for the defendant, The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, and the trial having been proceeded with

on the said 13th day of April, 1910, and on the following 14th, 15th, 19th, 20th and 21st days of April, 1910; witnesses having been sworn and examined, and the Court having duly heard the proof and evidence, oral and documentary, introduced in the cause on behalf of the respective parties, and having considered the same, and the testimony and evidence having been closed, and after argument said cause having been submitted to the Court on the 21st day of April, 1910, for its consideration and decision, and the Court, after due deliberation thereon, having heretofore on this day made and filed its findings and decision in writing, and ordered that judgment be entered in accordance therewith:

NOW, THEREFORE, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that the plaintiff herein, The United States of America, have and recover of and from defendants Augustus W. Boggs and The United States Fidelity and Guaranty Company of Baltimore, Maryland a corporation, the sum of Seven Thousand Four Hundred and Three Dollars and Nine Cents (\$7,403.09); provided, however, the liability of the said defendant The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, shall not exceed nor be enforceable herein for more than the sum of Sixty-five Hundred Dollars (\$6,500.00), exclusive of costs of suit; and that said plaintiff further have and recover from

vs. The United States of America. 59

said defendants its costs in this behalf, taxed at \$756.93.

Judgment entered this 18th day of July, 1910.

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy. [48]

[Endorsed]: No. 1399. U. S. Circuit Court, Ninth Circuit, Southern District of California, Southern Division. The United States of America, Plaintiff, vs. Augustus W. Boggs and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a Corporation, Defendants. Copy of Judgment. Filed Jul. 18, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. [49]

[Certificate of Clerk to Judgment-Roll.]

In the Circuit Court of the United States, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division.

No. 1399.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

AUGUSTUS W. BOGGS and THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND (a Corporation),
Defendants.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States, for the Ninth Judicial Circuit, Southern District of California, do hereby certify the foregoing to be a true copy of the judgment entered in the above-entitled action, and recorded in Judgment book No. 2, of said Court, for the Southern Division, at page 97 thereof, and I further certify that the foregoing papers, hereto annexed, constitute the *Judgment-roll* in said action.

Attest my hand and the seal of said Circuit Court, this 18th day of July, A. D. 1910.

[Seal]

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

[Endorsed]: No. 1399. In the Circuit Court of the United States, Ninth Judicial Circuit for the Southern District of California, Southern Division. The United States of America vs. Augustus W. Boggs et al. Judgment-roll. Filed July 18th, 1910. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Recorded Judgment, Register Book No. 2, page 97. [50]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUGUSTUS W. BOGGS and THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND (a Corporation),

Defendants.

Engrossed Bill of Exceptions for Use on Writ of Error and Appeal by Plaintiff and Defendant United States Fidelity & Guaranty Company.

Be it remembered that heretofore, to wit, on the 13th day of April, 1910, the above-entitled action came on regularly for trial in the above-entitled court before said Court without a jury, a jury trial having been waived by written stipulation filed herein, the Honorable Olin Wellborn presiding, Messrs. A. I. McCormick, United States District Attorney, and G. Ray Horton, Assistant United States District Attorney, appearing as attorneys for plaintiff, and Messrs. Gray, Barker, Bowen, Allen, Van Dyke & Jutten and William A. Bowen Esq., appearing as attorneys for the defendant, United States Fidelity & Guaranty Company of Baltimore, Maryland, and the defendant Augustus W. Boggs having failed and refused to appear in said action, and his default having been duly filed and entered therein.

That said trial commenced on the said 13th day of April, 1910, and proceeded on the 14th, 15th, 19th, 20th, and 21st days of April, 1910, and that the following proceedings were had therein after the reading of the pleadings and the statement of the case to the court:

Testimony of Augustus W. Boggs [for Plaintiff].

AUGUSTUS W. BOGGS, a witness called on behalf of the plaintiff, having been first duly sworn, testified as follows: [51]

Direct Examination.

(By Mr. HORTON.)

I live in Los Angeles, California.

I am in the contracting business.

My signature is affixed to the Articles of Agreement you hand me between the United States of America and Augustus W. Boggs of Riverside, California. Plans and specifications were not delivered to me along with that document at the time I signed the same, but later on and in connection with that particular contract. The plans and specifications which you now hand me are the ones I have referred to. (Counsel for defendant having waived his objection, the above-mentioned contract, plans, specifications, and advertisement were offered and introduced in evidence, and filed as one exhibit, being United States Exhibit "A." The aforesaid contract, specifications, and advertisement are in words and figures following, to wit:)

[United States Exhibit "A"—Contract, etc.]

**CONTRACT BETWEEN THE UNITED STATES
OF AMERICA**

and

AUGUSTUS W. BOGGS

of

RIVERSIDE, CALIFORNIA.

WHEREAS, by advertisement duly made and published according to law, proposals were asked for furnishing and delivering necessary materials and labor required to construct and complete a stone mess-hall and kitchen at the Rice Station School, Ariz., under advertisement dated Jan. 9, 1905, which is hereto attached and hereby made a part of this agreement.

WHEREAS, the proposal of Augustus W. Boggs, aforesaid, furnished in response thereto, was duly accepted on the twenty-third (23) day of February, 1905, on condition that he execute a contract in accordance with the terms of his bid.

NOW, THEREFORE, THIS AGREEMENT, made and entered into between C. F. Larrabee, Acting Commissioner of Indian Affairs, for and in behalf of the United States of America, of the first part, and Augustus W. Boggs, of Riverside, California, of the second part,

WITNESSETH: That the said parties have covenanted and agreed and by these presents do covenant and agree, to and with each other, as follows:

[52]

Article I. That the said party of the second part,

for the consideration hereinafter mentioned, covenants and agrees to furnish all of the labor and materials and do and perform all the work required to construct and complete a Stone Mess Hall and Kitchen, at the Rice Station School, Arizona, in strict and full accordance with the terms of the advertisement referred to in the foregoing preamble, and with the requirements of drawings, plans, and specifications for said work, copies of which are hereto attached, and all of which advertisement, drawings, plans and specifications are made a part hereof as fully as if they were embodied herein.

Article 2. It is further covenanted and agreed that the entire work shall be completed and turned over to the party of the first part on or before September 1, 1905, that should the said party of the second part neglect, fail or refuse to complete the entire work within the time above specified, then there shall be deducted Twenty (\$20.00) dollars per day from the contract price, hereinafter stipulated to be paid, for each and every day that the completion and delivery of the work may be delayed beyond the time specified in this contract; and the said party of the second part agrees to accept and receive said contract price less the said sum of Twenty (\$20.00) Dollars per day for each and every day of delay, as above set forth, in full payment for the work: provided, that if through any fault of the party of the first part the party of the second part is delayed in the execution of the work included in this contract the party of the second part shall be allowed one working day additional to the time

above stated for each and every day of such delay so caused, the same to be ascertained by the Commissioner of Indian Affairs: Provided further, that no claim shall be made or allowed for damages that may arise out of any delay caused by the party of the first part.

Article 3. It is further covenanted and agreed that the party of the first part reserves the right at any time to make changes, alterations, or omissions from or additions to the work and materials herein provided for, the valuation of such work and materials if not agreed upon, to be determined on the basis of the contract unit of value of material and work referred to, or, in the absence of such unit of value, on prevailing market rates, which market rates, in the case of dispute, are to be determined by the said Commissioner of Indian Affairs, whose decision with reference thereto shall be binding upon both parties; that no claim of damages on account of such changes or for anticipated profits shall be made or allowed; that the party of the second part shall not be allowed any additional compensation for labor or material unless he receives written authority from the Commissioner of Indian Affairs, and the price agreed upon before execution of the work; that no addition to or omission from the work herein specifically provided for shall make void or affect the other provisions or covenants of this contract, but the difference in the cost thereby occasioned, as the case may be, shall be added to or deducted from the amount of the contract; and that in the absence of any express agreement or provision to the contrary,

no addition to or omission from the work herein specifically provided for shall be construed to extend the time fixed herein for the final completion of the work.

Article 4. It is further covenanted and agreed by and between the parties hereto that if the said party of the second party shall fail to complete the work herein contracted for, or [53] any part thereof, in accordance with this agreement within the time herein provided for, or shall fail to prosecute said work with such diligence as in the judgment of the party of the first part will insure the completion of the said work within the time hereinbefore provided for, the said party of the first part may withhold all payments for work in place until final completion and acceptance of same, and is authorized and empowered, after eight days' notice thereof, in writing, to the party of the second part, and the said party of the second part having failed to take such action within the said eight days as will, in the judgment of the party of the first party, remedy the default for which said notice was given, to take possession of the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and, at the expense of said party of the second part, to complete or have completed the said work, and to supply or have supplied the labor, materials, and tools of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second

part and his sureties of the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this contract.

Article 5. It is hereby further covenanted and agreed that the materials delivered and the work done under this contract shall be subject to the inspection of the party of the first part, or of other person or persons appointed by him, with the right to reject any part thereof not in accordance with this contract; and the decision of the said party of the first part shall be final.

Article 6. It is further covenanted and agreed that in the execution of the said work the party of the second part will comply strictly with the provisions of the Act of Congress approved August 1, 1892, relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and the District of Columbia, and the Act of Congress approved August 13, 1894, for the protection of persons furnishing materials and labor in the construction of public works.

Article 7. It is expressly agreed and understood by the party of the second part that in conformity to the requirements of section 3737 of the Revised Statutes, neither this contract nor any interest therein shall be transferred to any other party or parties, and that any such transfer shall cause the annulment of the contract so far as the United States are concerned; all rights of action, however, for any

breach of this contract by the contracting parties being reserved to the United States.

Article 8. It is further agreed and understood that no Member of or Delegate to Congress, officer, agent, or employe of the Government shall be admitted to any share or part in this agreement or derive any benefit to arise therefrom.

Article 9. And the said party of the first part, acting for and in behalf of the United States, covenants and agrees to [54] pay, or cause to be paid, unto the said party of the second part, on the presentation of proper receipts or vouchers, in duplicate, to the Commissioner of Indian Affairs, the sum of Twelve thousand seven hundred nine no-100 (\$12,709.00) dollars, in lawful money of the United States, in consideration of the herein recited covenants and agreements made by the party of the second part, as follows: eighty (80) per centum of the value of the work executed and actually in place to the satisfaction of the party of the first part at the expiration of each thirty (30) days during the progress of the work, the amount of each payment to be computed upon the actual amount of labor and materials expended during the said period of thirty (30) days for which partial payment is to be made, (the said value to be ascertained by the party of the first part); and the balance thereof will be retained until the completion of the entire work, and the approval and acceptance of the same by the party of the first part, which amount shall be forfeited by the said party of the second part in the event of the nonfulfillment of this contract; it being expressly coven-

anted and agreed that said forfeiture shall not relieve the party of the second part from liability to the party of the first part for any and all damages sustained by reason of any breach of this contract.

Article 10. It is further agreed and understood that this agreement is not of full force and effect until approved by the Secretary of the Interior.

IN WITNESS WHEREOF, the parties hereto have hereunto subscribed their names and affixed their seals this Twenty-third (23) day of February, A. D. 1905.

All erasures and interlineations made before signing and sealing hereof.

SES

C. F. LARRABEE, [Seal]

Acting Commissioner of Indian Affairs.

AUGUSTUS W. BOGGS. [Seal]

Witnesses:

ERNEST D. EVERETT.

ROBT. P. CAPPS.

(For party of first part)

W. L. SHELTON.

JOHNSTON VETTERS.

(For party of second part)

[Endorsed]: Department of the Interior. E. S. W. Washington, Mar. 27, 1905, J. S. B. Approved E. A. Hitchcock, Secretary. [55]

SPECIFICATIONS

of the labor and material required in the construction of stone mess-hall and kitchen at Rice Station Indian School, Arizona, (15 pages) in accordance with the plans prepared by order of the Commis-

sioner of Indian Affairs, which plans are hereby referred to and made a part hereof.

GENERAL CONDITIONS.

1. The entire work is to be executed under the direction and to the entire satisfaction of the Commissioner of Indian Affairs, or his representative, and in conformity with his instructions and such detail as may be furnished from time to time during the progress of the work.

2. The contractor shall give his personal superintendence to the work, or shall have some competent person on the work at all times to act for him, and shall furnish all materials, labor, scaffolding, etc., necessary to complete the work according to the true intent and meaning of the drawings and these specifications, of which intent and meaning the Commissioner of Indian Affairs or his representative shall be interpreter, and his decision in any and all cases shall be final and binding on the contractor.

3. The location and grade of the building shall be indicated by the Superintendent of the School, if the same has not been otherwise designated by the topographical map, and the site shall be cleared by the contractor for the reception of the structure, and should be examined by the contractor before bidding. The contractor must lay out his own work correctly, and will be held responsible for measurements.

4. The grade line shown on drawings must be coincident [56] with the highest point of the site selected for the building, and all exterior stepping, etc., will be made to conform with the requirements of the ground.

5. Inasmuch as the topography of the site may not be quite level, the contractor must, whenever it is necessary, furnish the services of a competent and approved engineer to lay out the work and establish levels, using the datum lines as laid down on the drawings.

6. It is intended that the drawings and specifications shall include everything requisite and necessary to the proper and entire finishing of the building, notwithstanding every item necessarily involved by the work is not particularly mentioned, and all work when finished is to be delivered up in a perfect and undamaged state.

7. Where no figures or memoranda are given, the drawings shall be accurately followed according to the scale, but figures or memoranda are to be prepared to the scale in cases of difference.

8. In any and all cases of discrepancy in figures or drawings the matter shall be immediately submitted to the Commissioner of Indian Affairs or his representative for his decision, and without such decision said discrepancy shall not be adjusted by the contractor save only at his own risk, and in the settlement of any complications arising from such adjustment the contractor shall bear all the extra expenses involved.

9. The contractor is required to exercise proper caution and care to verify the figures before laying out the work, and will be held responsible for any errors therein that otherwise might have been avoided. He shall promptly inform the representative of the Commissioner of Indian Affairs in charge

of the work of any errors or discrepancies he may discover, in order that the proper corrections may be made and understood. [57]

10. The drawings and these specifications shall be considered as co-operative, and work or material called for by the one and not mentioned in the other is to be done or furnished in as faithful and thorough a manner as though fully treated of by both.

11. The Commissioner of Indian Affairs, or his representative, may require the contractor to dismiss such workmen as he deems incompetent or careless, and is to have at all times access to the work, which is to be entirely under his control.

12. The contractor will be held responsible for all damages to the building, whether from fire or other causes, during the prosecution of the work, and until the work is accepted. He shall be held responsible for all damages that may occur to persons, animals or vehicles from want of proper lighting, watching, boarding, or inclosing, or any accident arising from defective scaffolding, or any negligence on the part of himself or his employees.

13. No masonry is to be constructed or plastering done during freezing weather. The contractor, however, with the consent of the Commissioner of Indian Affairs, or his representative, may provide stoves and fuel for heating the building while plastering is going forward and until it is completed, and all material and work are to be properly protected from the weather.

14. Except it be otherwise specified, all materials are to be of the best quality of their respective kinds,

and all labor is to be done in the most thorough prompt and workmanlike manner, to the full satisfaction of the Commissioner of Indian Affairs or his representative.

15. In all cases, when an article is mentioned in these specifications, followed by the words "best quality," "approved quality," "or other equally good," etc., the Commissioner [58] of Indian Affairs or his representative shall decide what is the best and most suitable article to use.

16. Detail drawings will be given of such portions of the work as the Commissioner of Indian Affairs or his representative may desire to explain more fully, and any work constructed without such detail drawings, except by permission expressly obtained, must be taken down and replaced by other work in accordance therewith, at the contractor's expense, if so desired by the Commissioner of Indian Affairs or his representative.

17. All drawings and memoranda relating to the work are the property of the United States, and are to be carefully used and returned to the Commissioner of Indian Affairs at completion, or cessation from any cause, of the work.

18. The contractor shall render assistance to the other mechanics in every way in which his special work can be of service, and such assistance shall be given promptly and thoroughly without additional charge.

19. The work shall be carried on systematically and shall be so managed at all times by the contractor as to secure rapid progress and avoid annoy-

ance and inconvenience.

20. The contractor and his employees must work in harmony with other contractors on the ground and in such order and places as may be required by the Commissioner of Indian Affairs or his representative.

21. The contractor must remove all rubbish at the completion of the building.

22. The Commissioner of Indian Affairs reserves the right at any time to make changes, alterations or omissions from or additions to the work or materials herein provided for, the valuation of such work and materials, if not agreed upon, to be determined on the basis of the contract unit of value of material [59] and work referred to, or in the absence of such unit of value, on prevailing market rates, which market rates, in the case of dispute, are to be determined by the Commissioner of Indian Affairs, whose decision with reference thereto shall be binding upon both parties, and that no claim of damages on account of such changes or for anticipated profits shall be made or allowed. The contractor will not be allowed any additional compensation for labor or materials unless he receives written authority from the Commissioner of Indian Affairs and the price agreed upon before execution of the work. That no addition to, or omission from, the work herein specifically provided for shall make void or affect the other provisions or covenants of the contract based upon these specifications, but the difference in the cost thereby occasioned, as the case may be, shall be added to, or deducted from, the amount of the con-

tract; and in the absence of an express agreement or provision to the contrary, no addition to, or omission from, the work herein provided for shall be construed to extend the time fixed herein for the final completion of the work.

23. Partial payments in no way to be considered as an acceptance of any work or material included in this contract.

24. The Commissioner of Indian Affairs reserves the right to order a cessation of all or any part of the work when, in his judgment, the interest of the Government demands the same. Such cessation not to impose extra expense upon the Government nor invalidate the contract.

25. The Commissioner of Indian Affairs reserves the right to reject any or all bids or any part of any bid, if deemed for the best interest of the Government.

26. Each bidder must understand that, should his proposal be accepted, the materials delivered, and the work performed by him, at any and all times during the progress of the [60] work, and prior to the final acceptance of and payment for the same, shall be subject to the inspection of the Commissioner of Indian Affairs or his representative, with the full right to accept or reject any part thereof; and that he must, at his own expense, within a reasonable time, remedy any defective or unsatisfactory materials or work, and that in the event of his failure to do so, after notice, the same will be remedied at the cost of the contractor.

(Special Attention.)—

27. Bidders should state specifically in their bids the proposed price for each building, etc., and the length of time within which the whole work is to be completed and turned over. The time in which the work is to be completed is frequently an important consideration, when making awards. Bidders should, therefore, name the shortest period within which they are prepared to do the work properly.

28. The attention of bidders is invited to the Act of Congress approved August 1, 1892, entitled "An Act Relating to the Limitation of the Hours of Daily Service of Laborers and Mechanics Employed Upon the Public Works of the United States and of the District of Columbia"; also to the Act of Congress approved August 13, 1894, entitled "An Act for the Protection of Persons Furnishing Materials and Labor for the Construction of Public Works."

29. Each bid must be accompanied by a certified check or draft upon some United States depository or solvent bank in the vicinity of the residence of the bidder, made payable to the order of the Commissioner of Indian Affairs, for at least five per cent of the amount of the proposal, which check or draft will be forfeited to the United States in case any bidder or bidders receiving an award shall fail to promptly execute a contract [61] with good and sufficient sureties; otherwise to be returned to the bidder.

30. Bids accompanied by cash in lieu of a certified check will not be considered.

31. The building is to be completed and ready

for occupancy on or before the first day of August, 1905.

EXCAVATION.

Removal of Loam, etc.: Remove the sod and loam from within the enclosing walls of building and deposit where directed.

Excavations: Excavate the ground as required by the site and drawings, for all the footings, piers, etc., to the depth figured or shown, or to such depth as will provide absolute security against damages from frost or insecure foundations. This must be done irrespective of depths shown or figured on drawings, and without extra charge to the Government. The bottom of all trenches must be truly leveled and properly stepped where necessary. Excavations to be left until walls are well set and dry. Surface water must be kept out of trenches, and any water that may get in must be removed by the contractor. Earth from excavations to be deposited where directed.

Earth Filling: When walls are dry fill up the superfluous width of all trenches with moist earth and ram solid, and give the surface a proper grade to throw water from building.

Water: The contractor is required to supply all the water necessary for the construction of the building.

NOTE.

The project covered by the following specifications and accompanying drawings cover the reconstruction of the building destroyed by fire, with the following named changes in structural elements. [62]

All debris resulting from the fire will be removed

by the Government.

The stone foundations are reported undamaged and may be utilized after being put in proper condition.

The specifications and drawings cover an adobe building; bidders, however, are directed to estimate for a stone building, preserving all dimensions as given on drawings and modifying structural details to suit the stone construction.

Stone to be used is found about two miles from the site and is readily quarried, being very soft and light and can be cut and shaped with crudest tools. Blocks of any size can be obtained without blasting. This stone may be substituted for the brick work specified, and where practicable and satisfactory to the Superintendent.

Plastering to be of approved brand hard wall plaster with hard finish and applied as per manufacturer's directions.

All supply and waste pipes to be connected with present mains, and also branches to gas main.

STONE WORK.

All stone work must be sound, strong and of a homogeneous character.

Footings: The footings will be full size through stones, roughed to good beds and joints, and where walls of unequal depth meet, bond stones of large size must interlock across the line of connection.

Walls: All walls to be the height of the first tier of joists, to be of first class rubble masonry, well scabbled, solidly bedded and with close joints properly weathered. Interstices to be filled with stone chips bedded in mortar. Bond stones to be placed at

frequent intervals and corners, jambs and angles to have extra size stone thoroughly interlocked. Walls to [63] be built perfectly plumb and straight and to true lines and leveled up with large size stone to receive the joists and other timbers.

Walls to be covered and protected from storms during the progress of construction and thoroughly cleaned down at completion.

CUT STONE.

Stone Caps: All chimneys to have stone caps 6" thick, in one piece for the smaller chimneys and two pieces for the larger, rock faced, tooled beds.

Footings: Stones for posts supporting girders, stoops, etc., as shown, 5" thick, faces dressed moderately smooth, sides broken to good lines.

Cleaning and Protection: All cut stone to be thoroughly cleaned at completion; all broken and defective parts to be made good.

BRICK WORK.

All brick to be sound, hard and well burned of a quality approved by the Superintendent or other authorized agent of the Government. Brick to be laid wet in dry, warm weather, and dry if laid in wet weather. All joints to be thoroughly built and slushed with mortar, leaving no empty spaces.

All work to be built perfectly straight and plumb and to true lines, and properly bonded.

Face brick: Face brick to be hard red selected for color and gauged for size, laid with neat struck joints not over $\frac{3}{8}$ " thick. Facing brick to be properly cleaned at completion, removing joints not over $\frac{3}{8}$ " thick. Facing brick to be properly cleaned at

completion, removing all lime stains, etc.

Chimneys, etc.: Build chimneys with neat struck joints $\frac{3}{8}$ " thick, outside and inside. Joints to be reduced to $\frac{1}{4}$ " on [64] chimney breasts and flues exposed to view in rooms. Outside of chimneys to be plastered opposite all timbering. Set iron thimbles for studd-pipes in all flues not connected with fireplaces, and clean out doors at the base. Fireplaces to be constructed as per detail where indicated and properly throated. Chimneys to be capped with stone as heretofore specified.

Earths for hearths to be laid in cement. Hearths to be of selected hard, red brick laid on a bed of sand and joints filled with mortar.

Setting Frames, etc.: The mason will assist the carpenter to set all door and window frames and see that they are kept well braced and solidly built in walls, all crevices to be filled with mortar.

ADOBE.

All walls and partitions above foundations to be of adobe manufactured in the best manner. Clay to be tempered to the proper consistency, thoroughly kneaded and receiving the necessary "binder" material. Blocks to be accurately moulded to good arises in well made frames, thoroughly sun dried.

Walls to be carefully constructed, well bonded, built straight and plumb and to true lines on all faces and leveled to receive all timber, etc., at proper heights.

The mason will assist the carpenter to set all door and window frames and see that they are kept well braced and are built solidly in walls, crevices to be

built with mortar.

He will build all channels and leave apertures required by plumber and insert as the work progresses, all bolts, anchors, plates, furrings, lugs, back sills, lintels, wood brick, etc., necessary for other trades and as required by the Superintendent. In rooms to be wainscoted insert, as the walls and partitions are built, continuous nailing strip, 1"x 6", at floor level, one of same 2' and 4' above floor respectively.

[65]

Strips to extend around the four sides of rooms, and additional strips to be built in the walls of drying room 7' above floor for securing clothes' line hooks.

MORTAR.

Mortar for stone and brick work to be of freshly burnt lime and clean sharp sand, one of lime to two of sand.

Adobe walls to be constructed with mortar of adobe clay with the admixture of a small proportion of lime.

IRON WORK.

Furnish a set of constructional iron work required or shown on drawings.

Wall plates will be secured with $\frac{5}{8}$ " bolts, 33" in length, provided with the necessary nuts, washers, etc., and placed not over 8' 0" on centres. One to be placed at every splice in the plate at corners and angles, and at each side of chimneys located on exterior walls. Wooden anchor plates, 2"x 6" and from 3' to 4' long, to be provided for each bolt and built in walls as per details.

Cast iron thimbles and tin cover for stove pipes in all smoke flues where required.

Cast iron clean out doors and frames to be placed at the base of all smoke flues not in connection with fire places.

Galvanized iron star ventilators for roof as indicated.

CARPENTRY.

Framing: All framing timbers to be of pine, all sizes as given, thoroughly seasoned, free from shags or large knots and other imperfections impairing its strength or durability, straight grained and square edged. All timbers, girders, trimmers, and joists must be properly framed; no portion of [66] framing to be placed within 2" of brick work of any smoke flues. All framing to be done with a view to prevent excessive shrinkage or unusual settlement. All timber in excess of 2" of thickness except door and window sills may be formed of 2" stuff breaking joints and thoroughly nailed with 16d. steel cut nails. Joists to be mortised into headers and spiked. Headers and trimmers to be double joists, mortised and thoroughly spiked together. Deal joists to be mortised and spiked to headers. All joists to be sized to an even depth and properly cambered, laid solidly on the walls and bridged with herring-bone cross bridging, $1\frac{1}{2}$ " x 3", once in every 8' of span. Bridging to be closely fitted and secured with tenpenny nails two at each end, properly trimmed around all chimneys.

Girders as required by drawings supported on posts footed on blocks of stone. Where splicing be-

comes necessary it must be made over posts.

Roof trusses to be constructed and located as shown. Purlins to be notched over principals and thoroughly spiked. Rafters to be notched and spiked to purlins, ridge pole, valley and hip rafters. Cleats, 2" x 2", to be spiked, to tie beams for support of ceiling joists. The latter to be notched over and spiked to cleats.

Wall plates to be laid solidly on and anchored to sills as heretofore specified, and angles and splices to be halved and spiked. The contractor must provide all necessary supports for the roof to make a strong and substantial construction.

Projecting rafters forming hood over ice platform to be dressed. Have plate to be dressed and supported on brackets of 2" x 4" stuff secured to walls as shown.

Sheathing: Cover roof and front of dormers with $\frac{7}{8}$ " boards dressed one side edged and securely nailed to each bearing. Sheathing for hood over ice platform to be dressed. [67]

Shingles: Cover the roof with best quality Redwood shingles, $4\frac{1}{2}$ " to the weather each twice nailed. Short nails to be used for hood over ice platform. Shingle the hips. Face of dormers to have shingles of uniform dimensions.

Cornice: Cornices to be of pine, substantially put up and constructed as shown on detail. Planciers to be of matched pine.

Make saddles on ridges of roof.

Size of timbers: Floor joists to be as figures on drawings, 16" o.c. Ceiling joists, 2"x 8", 30" o.c.

notched and spiked to cleats on tie beams to footing of rafters and other timbers. Girders as indicated on plans. Wall-plates 2" x 12" and 4" x 12" as shown on drawings.

Hip and valley rafters 2" x 10". Other roof timbers given on drawings, and as required.

Wooden Lintels and Sills: Lintels for doors and windows not less than 6" deep and constructed as shown on detail. Wooden templates 1½" thick under ends of lintels.

Back sills for all windows to extend 6" into each jamb.

Grounds: Furnish to mason all wood bricks and other grounds necessary for securing trim, wainscoting, window and door jambs, etc.

Flooring: The flooring throughout the building to be of clear, quarter sawed, matched yellow pine, 7/8" thick, not over 4" in width, tightly strained and blind nailed to each joist. All over wood to be planed off and all butt joints to be well secured. Similar flooring for corridor.

Stoops, etc.: Construct stoops and steps as shown on drawings, of clear pine, free from pitch and well seasoned. Flooring for stoops to be 1½" x 4" clear matched quarter sawed pine, dressed one side and blind nailed to bearings. Treads of [68] stoops to be of clear hard pine, 13/8" thick. Nosings to be returned. Risers to be 7/8" thick; carriages and framing to be 2" x 8" supported on 6" x 6" posts footed on flat blocks of stone. All framing timbers exposed to view to be dressed or cast with dressed boards.

Ice Platform: To be substantially framed and constructed in the best manner; flooring to be of 2" unsurfaced plank laid close and thoroughly nailed.

Interior Finish: The whole of the interior finish to be of No. 2 pine, except otherwise specified, and papered and made promptly smooth before the priming coat is applied. None of the mill work to be taken into the building before the plastering is completed and dry, but such as is brought on the ground must be carefully stored under cover, kept dry and primed immediately.

Wire nails to be used for securing all trimmings properly set and stopped with putty.

Doors: Frames for interior doors to be $1\frac{1}{8}$ " thick, rebated and covering the whole jamb. Exterior frames as per details $1\frac{7}{8}$ " thick, ploughed on the back and primed all round with lead paint before being placed in position. Thoroughly nailed to sills and to wood bricks. Sills to be 4" thick, of hard pine or oak, beveled.

Doors throughout except where otherwise required, to be No. 2 o. g. white pine stock, 5 panels. Mortised and tennoned, wedged and glued, hung as indicated on plans. Panels to be raised. Sizes of doors to be as given on drawings. Transoms $1\frac{3}{8}$ " thick where indicated for exterior doors. Imposts to be neatly moulded. Thresholds for all doors of hard pine, double beveled, $\frac{5}{8}$ " x 4" accurately fitted and securely nailed. Astragal joints for double doors. Batten doors of matched pine with proper frames for foundation walls as indicated. [69]

Windows: Box frames for all windows, except

those for dormers which are to have plank frames $1\frac{3}{8}$ " thick and rebate for swinging sash. Pulley stiles $1\frac{1}{8}$ " thick for all box frames to have pockets cut therein. Sub-sills to be $1\frac{3}{8}$ " thick. Hanging stiles $1\frac{3}{4}$ " thick. The stools to be $1\frac{3}{8}$ " thick, nosed and returned and moulded. Frames to be primed all round with lead paint before being placed in position. Check rail sash, $1\frac{5}{8}$ " thick, and hung with best braided hemp cord for all box frames. Dormer sash and slat ventilators $1\frac{3}{8}$ " thick. Sash to be hinged. Slats to be 7 to a foot. Jamb linings and soffits to be of $\frac{7}{8}$ " matched pine blind nailed to wood bricks.

Wainscoting: All rooms, pantry and china closet to be wainscoted with $\frac{7}{8}$ " x 4" clear matched and beveled pine, and 4' in height, for cloak room 5', finished with neat moulded capping and $\frac{7}{8}$ " x 2" foot moulding scribed to floor. All to be secured to the grounds placed at floor, at top and one intermediate, as heretofore specified.

Architraves: Plain architrave with rounded corners $\frac{7}{8}$ " x 4" for all windows and doors carefully mitered. Plinth blocks at floor.

Shelving: Pantry and china closet to be shelved as indicated on plans, five rows in each, to be 14" in width, braided and substantially put up. Mantel shelves as per details. Grooved drip shelves $1\frac{3}{8}$ " thick for sinks in kitchen and bakery.

Hearth Borders: Hard pine beveled borders for all hearths.

Lining: All ceilings to be lined with $\frac{5}{8}$ " clear

matched and beveled pine secret nailed to each bearing.

The contractor to provide and put up beaded pipe boards where required. [70]

Scuttle: Construct scuttle in ceiling 2' x 2' of matched and beveled pine, to be flush with ceiling and supported on moulding nailed around opening.

Ventilators: Slat ventilators for dormers and ceilings, as shown. Slats seven to a foot. Those for ceilings to be 2' x 2', flush with ceiling and supported on mouldings nailed around opening.

Kneading table and troughs: Provide and set up in bakery a kneading table of well seasoned white pine, 2' 10" in height. Top to be 1½" thick.

Dough troughs for bakery to be constructed in the best manner of well seasoned white pine 1½" thick of the following dimensions: 2' 6" wide at top, 1' 10" wide at bottom, and 1' 6" deep, inside measure. The top of troughs to be 2' 10" from the floor.

Refrigerator: Refrigerator to be built where indicated on plan and shown and described on details. Sash to be stationary and screwed in place.

HARDWARE.

All hardware necessary to thoroughly complete the work is to be provided and put on in the best manner by the contractor.

Locks: All locks to be the best quality easy spring mortise knob locks, 3½" x 3", with iron fronts, striking plates and bolts, and two brass keys to each, brass tagged with number of door. For main entrance doors use 5½" x 4". All doors carrying keys to be numbered with neat 1¼" metallic figures.

Provide japanned refrigerator door fasteners, condits or equal. Provide all necessary catches, etc.
[71]

Hinges: All doors to have steel loose pin butts, $3\frac{1}{2}'' \times 3\frac{1}{8}''$, for interior doors, and $4'' \times 4''$ for exterior doors swinging sash $3'' \times 3''$. Suitable hinges for batten doors in foundation walls. Approved refrigerator hinges.

Knobs and bolts: Doors to have white porcelain knobs with nickeled mountings and roses. Slip bolts for swinging sash. Floor bolts for standing leaf of main entrance and doors, top and bottom.

Sash fasteners and lifts: All sash to have approved sash fasteners and hook lifts of japanned iron. Lifts two to a sash.

Sash cord, weights and pulleys: Best braided hemp cord and cast iron weights for all sash where required. All box frames with best wrought pin and polished wheel pulleys $2''$ in diameter.

Hooks: Provide and secure to wainscoting in cloak room 17 dozen japanned clothes hooks of large size. Provide also and put up as directed three dozen tinned, wrought iron meat hooks in refrigerator. One dozen japanned clothes line hooks for drying room.

PLASTERING.

Walls and partitions to be plastered with adobe clay. To be of the proper consistency and applied in the best manner and finished smooth. Plaster to be carried to floors everywhere, straight, out of wind and free from defects.

TINNING.

All tinning to be of Merchants or N. & G. Taylors double coated stamped plates. Flash and counter-flash at all chimneys and other parts of roof where flashings are *necessary*. Flashings to be of IX tin well secured and calked into brick joints with Slatter's cement.

Cover all valleys. Tinning to be thoroughly locked and soldered and receive a coat of metallic paint on under side before laying. Soldering to be done with resin flux, no acid to be used. Warrant all water tight. [72]

PAINTING AND GLAZING.

All exterior and interior surfaces wood work, excepting floors, ceiling and wainscoting and including stoops, platform, steps and shingles in face of formers, to receive three coats of best white lead paint, finished in two shades selected by the Superintendent. All exposed tinning and roof shingling to have two coats of best metallic ground in oil.

Wainscoting throughout to have a priming all approved liquid filler and two thick coats of the best light hard oil finish, rubbed with excelsior between coats.

The fronts of shelving and all pipe boards and boxes to have a coat of hard oil. Ceilings and floors to receive a coat of linseed oil and likewise the exposed wood work in refrigerator. All knots to receive a coat of shellac before priming and all nail sets to be filled with putty. All pipes in view pertaining to plumbing to be painted.

Glazing: All glass to be the best American double

thick, well sprigged and secured with dark putty. All to be left perfect in every particular at the finish.

PLUMBING.

Sinks: Provide and set in kitchen one 22" x 72": in bakery one 18" x 36" and in mess-hall one 18" x 30" galvanized iron sinks, supported on galvanized iron brackets. Wastes to be 1½", 4 lbs. per foot, trapped and connected with general drain system as shown.

Hot and cold water to be provided through ¾" galvanized iron pipes and finished brass bibbs.

Slop Sink: Provide and set in kitchen galvanized iron slop sink 16" x 16" with 4" outlet and waste, strainer and trap, supported on strong iron brackets or stand. Hot and cold water [73] to be provided through ¾" galvanized iron pipes and finished brass bibbs.

Boiler: Provide and set in kitchen, where shown, galvanized iron boiler (144 gallons) on iron stand. All connections to be with ground joint couplings. Provide boiler with sediment and hose bibb, and make all connections with heater, sinks, slop sink, laundry tubs, etc., as required and shown.

Heater: Provided and set complete in kitchen, Wilkes or equal, heater, suitable for soft coal and to have a capacity of 150 gallons per hour. Make all necessary pipe connections in the best manner and guarantee perfect circulation.

Bell traps: Provide in connection with refrigerator cast iron bell traps with 2" cast iron waste pipe connected with general drains, as shown.

Laundry tubs: Provide and set complete in laundry eight soap stone tubs on painted iron legs,

soap cups and $1\frac{1}{2}$ " brass waste plugs. Wastes to be $1\frac{1}{2}$ " lead, 4 lbs. per foot connected with 3" cast iron waste. The latter to be trapped.

Hot and cold water supply through $\frac{3}{4}$ " galvanized iron pipes and finished brass bibbs, let through back of tubs.

Piping: Main supply to house to be $1\frac{1}{2}$ " extra strong galvanized iron pipe extending into building from a point 10' outside the wall, as may be directed by the Superintendent. Connection with local water supply system to be made by the Government. Gate valve and key in suitable box of permanent material, to be placed on this pipe where directed by the Superintendent, to control supply to house.

All supply pipes to be thoroughly secured with hooks and hangers. Cut off and waste cocks to be conveniently placed on all pipes supplying each fixture.

Extra heavy 3" and 5" cast iron, coal tar coated drain [74] pipes as indicated and extending to grease drip; to be extended from this drip through 5" salt glazed vitrified pipe, as shown, beginning in a trap with inverted elbow with inlet at least 6" below water line.

Grease drip to be constructed of brick 3' in diameter with concrete bottom lined with $\frac{5}{8}$ " Portland cement to the height of 6" above inlet pipe. Stone slab with hole cut through and iron manhole cover.

Pipes to be laid to a true grade of not less than $\frac{1}{4}$ " to the foot. Bells to be sunk below grade of trenches to admit of a solid bearing for pipe.

All waste pipes above ground are to be arranged

so as to admit of inspection and cleaning; to this end brass clean cut screws are to be placed at convenient points.

The points of iron pipes to be thoroughly calked with oakum gaskets and leaded. Lead to be well tamped. All connections to be with Y's and proper bonds. Connections of lead with iron pipes to be made with brass ferules and wiped joints. Short connection with fixtures to be with AA lead pipe.

Joints of terra cotta pipe to be with hydraulic cement.

All waste pipes inside building shall have the opening stopped, then filled with water at the highest point and left standing for not less than twenty-four hours, and any leaks discovered shall be made right at once. Test to be made at the expense of the contractor.

Plumbing to be warranted water tight, stench proof and perfect in every particular.

GASOLINE GAS PIPING.

All piping to be concealed and the building is to be piped in strict accordance with the following specifications, [75] and have the number of lights indicated on plans. Piping to be plain black iron.

The location of risers to be as near the carbureter as circumstances will permit and on an inside wall and in such position as will permit a fall of the same with the least cutting of joists. One or more risers to be used if found necessary to avoid such extensive cutting.

The points of connection with risers must be kept

low enough to insure a proper fall for horizontal pipes.

All piping must have a fall of at least $1/16$ th" to a foot, and where exposed to cold, a fall of $1/8$ " to a foot must be secured.

Where pipes cannot be run to risers without excessive cutting of joists, they must be laid with a fall towards convenient points where relief or drip pipes are to be attached so that the condensation can be collected and carried back to carbureter.

The fall of the piping must be established accurately by spirit level and not by joists or floors, and all traps or sags must be avoided.

Pipe to be secured with gas fitter's hooks and in such manner as to make it impossible for any portion to settle and form traps.

All drops must be taken from the side or top of main line of pipe, and run horizontally to location of drops. The drop must be securely screwed up and well stayed both at the top and bottom of joists, hung plumb and brought about 3" below joists. Where pipe is run on a brick wall the brick is to be chipped out to allow the pipe to be sunk so that the plaster will fully cover it.

In supplying brackets the feed pipe must be run up to and not down to the fixture. [76]

Use white lead mixed with boiled oil for making joints, being careful not to get so much in the fitting or in the pipe that when screwed together the lead will close up the opening.

No riser to be less than 1" (inside) diameter, and

no pipe, even to supply one light, is to be less than $\frac{3}{8}$ ".

Connections: All connections with the different elements of the combination to be with galvanized iron pipes of ample capacity.

Gas Fixtures: All pendants to be solid iron pipe, bronzed and fitted with brass L burner cocks, well made and substantial, of suitable spread, ornamental cast iron, centre body. Main supply to be full size of feed pipes. Brackets to be solid brass well made and substantial, gilt finish. All fixture joints to be heated and cemented.

Adjustable Bunsen burners with Welsbach mantels No. 197, 80 candle power, and brass parts No. 34. Best mica chimneys, globes and holders to be provided for.

Each piece of pipe must be looked into or blown through to see that the bore is clear. No pipe to be laid on an outside wall or in exposed places. If impossible to avoid doing this, they are to be well protected with felt covering.

Following table gives the proportionate sizes and lengths of pipe to be used:

Size of Pipe.	Greatest Lengths allowed.	Greatest Number of lights.
$\frac{3}{8}$ inch	15 feet	3
$\frac{1}{2}$ "	20 "	6
$\frac{3}{4}$ "	50 "	12
1 "	75 "	25
$1\frac{1}{4}$ "	90 "	75
$1\frac{1}{2}$ "	125 "	100
2 "	150 "	200

After all the pipe is in and capped up, it must be

tested with mercury pressure gauge, with 6" column mercury, which must remain stationary for a period of five months. [77] If there be any large leaks, either sand holes or splits, the defective piece must be taken out and replaced by a perfect one. If the leaks are very small, they may be repaired by calking with the pressure of using soap suds to tell when the leak is stopped, and then cement them. Cementing must not be done without first calking.

Pipe must not be placed near steam or hot water pipes.

A. C. TONNER,

Acting Commissioner of Indian Affairs.

ADVERTISEMENT.

PROPOSALS FOR

STONE MESS HALL.

Department of the Interior, Office of Indian Affairs,
Washington, D. C., January 9, 1905.

Sealed proposals, endorsed "PROPOSALS FOR STONE MESS HALL AND KITCHEN, RICE STATION SCHOOL, ARIZONA," and addressed to the Commissioner of Indian Affairs, Washington, D. C., will be received at the Indian Office until 2 o'clock P. M., of February 15, 1905, for furnishing and delivering necessary materials and labor required to construct and complete a stone mess hall and kitchen at the Rice Station School, Arizona, in strict accordance with the plans and specifications and instructions to bidders, which may be examined at this Office, the officers of the Arizona Republican, Phoenix, Arizona; Arizona Star, Tucson, Ariz.; The

(Testimony of Augustus W. Boggs.)

Herald, El Paso, Tex.; The Improvement Bulletin, Minneapolis, Minn.; The American Contractor, Chicago, Ill.; The Builder & Contractor, Los Angeles, Cal.; at the U. S. Indian Warehouses, 119 Wooster St., New York City; 265 South Canal St., Chicago, Ill.; 602 South Seventh St., St. Louis, Mo.; 815 Howard St., Omaha, Neb.; 23 Washington St., San Francisco, Cal., and at the school. For further information apply to J. S. Perkins, Superintendent, Talklai, Arizona. F. E. Loupp, Commissioner. [78]

Cross-examination.

(By Mr. BOWEN.)

When I made my estimate in preparing my bid, I had those plans and specifications as a basis. They were given to me first before I entered into that contract. I had them the first thing to figure from. The plans and specifications introduced as United States Exhibit "A" are duplicates of the original plans which were worn out at the building. After my bid was accepted the contract was entered into, and plans and specifications which I had already had were attached to it. I think the contract was sent on later after we had commenced work. I had already commenced work before I received the contract. The plans and specifications which were introduced here, were prepared first and the contract was signed up afterwards. The plans and specifications that are now in evidence were part of the contract I signed.

Testimony of James S. Perkins [for Plaintiff].

JAMES S. PERKINS, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HORTON.)

I live at Rice Station Indian School, Arizona. I have been engaged at that place more than five years; between five and six years. I was at Rice Station Indian School during the year 1905. Rice Station Indian School is located on the Gila Valley, Globe and Northern Railroad, now called the Arizona, Eastern, in Gila County about twenty miles from Globe, between Globe and Bowie. The railroad station is now called Rice; it was formerly called Talklai. I am acquainted with the defendant, Augustus W. Boggs. I met Mr. Boggs several years ago. He was on a piece of work at the Truxton Canyon School. I was superintendent of the Truxton Canyon School at that time, and I met Mr. Boggs there. [79] I knew him about two years before I saw him at Rice. The occasion of my seeing the defendant Boggs at Rice, Arizona, was that Mr. Boggs had the contract for putting up a building there, a stone mess-hall. Mr. Boggs commenced work in the Spring of 1905; commenced work in the quarry. He began work in the quarry along early in the Spring, perhaps April or May, along there somewhere; I don't remember just exactly when it was. He was getting out stone for the building: that is, the Rice Station Indian School building, for the mess-hall and kitchen.

(Testimony of James S. Perkins.)

The connection I had with the so-called mess-hall and kitchen that was being constructed there by Boggs was, that I was looked to by the Department to supervise the work. The Department expected me to supervise the work on behalf of the Government, and I did so. In my work of inspecting the stone mess-hall and kitchen, as it was being constructed by Mr. Boggs, I was furnished plans and specifications by the Department. The plans and specifications filed as United States Exhibit "A" in this case are the same as the plans and specifications that were used in connection with the construction work upon which I am testifying. I received my copy of the plans from the Government in the Spring of 1905 approximately: I don't remember whether they were mailed to me before or after the contractor Boggs began his work there: I could not say positively. The first work that was done on the proposed improvement there was, I think, getting out stone from the quarries. The contractor was engaged in that work in the quarry I think between forty and fifty days—forty-six days, I think, or forty-seven days—somewhere along there.

The next work done was that the stone was hauled from the quarry about two miles and a half away, I presume. Mr. Mulford commenced laying the stone in the walls. His full [80] name is William Mulford. Stone was hauled and then was put into the walls, and the work was moved along, the walls laid up and the work plastered and the building finished up. J. C. Kincaid had charge of the wood construc-

(Testimony of James S. Perkins.)

tion in the building.

During the course of the construction of that building in my capacity as superintendent of construction under authority from Washington, I made examinations of the building. During the course of my examination of the building under construction from time to time, I observed defects or departures from the plans and specifications. I don't remember just when my attention was first called to any matter of that nature. My attention was called to it specifically by Mr. Carroll, the carpenter at the school. His full name is William R. Carroll. He is employed by the Department in the capacity of carpenter at the school. Immediately on the matter being called to my attention, I examined into the matter to see if it were true. I examined the stone construction, the mortar, wood construction as it progressed and in fact examined the whole building and made report to the Department in the matter. I would know the details of the report if I saw the report. I made the report which you now hand me, and of course I would be better prepared to testify as to the defects I found in the building, if I examined the report, but I recollect a lot of it anyhow.

The report which is before me states the result of the actual examination of the work that I did upon the premises. I made that examination several days, at any rate, before I made this report. That is about the time. The time is July 21st, 1905. I found at that time on my examination of the building, the defects that are mentioned in this report.

(Testimony of James S. Perkins.)

The wall-plates were not as specified. The specifications called for 4x12 and 2x12 wall-plates, and the contractor had used 2x6 mostly, and [81] the specifications called for anchor bolts $\frac{5}{8}$ x33 inches which were left out. The specifications called for two purlins in the room 6x8 over the dining room. One purlin was used 4x8. The specifications called for $\frac{5}{8}$ ceiling, $\frac{7}{8}$ wainscoting and $\frac{7}{8}$ x4; $\frac{3}{8}$ ceiling and $\frac{3}{8}$ wainscoting were used. The plans called for bridging every eight feet between the joists and a lot of that was omitted. The specifications called for quarter-sawed flooring matched yellow pine. A good deal of the flooring was not quarter sawed. None of it was yellow pine—Oregon pine. Oregon pine was used instead. The specifications called for $1\frac{1}{8}$ flooring for the stoops, and $\frac{7}{8}$ th stuff was used. The hearths were poor. The specifications called for Dowell rafters 2x8; 2x5 were used. The window sash was poor—cheap grade. I notified Mr. Boggs in writing of these variances. I mailed him a notice thereof, and the paper you now hand me is a copy of the letter dated July 23d, 1905, which I wrote to Augustus W. Boggs addressed Riverside, California.

(Said letter offered and introduced in evidence marked United States Exhibit "B," and read in evidence as follows:)

United States Exhibit "B."

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station Boarding School,
Talklai, Arizona, July 23, 1905.

Mr. A. W. Boggs,
Riverside, Calif.

Sir:

Specifications for Mess-Hall now under construction at this place by you call for doors to be mortised and tenoned wedged and glued. As the ones you have furnished are doweled doors you are informed that they are not satisfactory. You are also informed that the window sash is not satisfactory. You are informed that the ceiling and wainscoting are not in accordance with the specifications and are both highly unsatisfactory. The flooring is not in accordance with the specifications:—Joists are not bridged and are therefore not satisfactory. You are further advised that the plumbing is not being done in a satisfactory manner. When I offered criticisms to Mr. Kincaide, presumably your foreman, his reply was that he would put the work in regardless of any protest on the part of the Government, and that this was according to your orders. You are informed that the hearths have been done in a very shiftless manner and are very [82] unsatisfactory. All this is for your information and future benefit.

Very respectfully,

J. S. PERKINS,

Supt.

102 *The United States Fidelity etc. Co.*

(Testimony of James S. Perkins.)

I certify that the above and foregoing is a true copy of a letter sent to A. W. Boggs by me.

J. S. PERKINS,
Supt. & S. D. A.

WITNESS.—(Continuing.) The paper which you now hand me is a copy of another letter mailed by me to the defendant, Augustus W. Boggs.

(Said paper offered and introduced in evidence marked United States Exhibit "C" and read in evidence as follows:)

United States Exhibit "C."

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, July 24, 1905.

Mr. A. W. Boggs,

Riverside, California.

Sir:

The specifications for the mess hall now under construction at this school by you state that no framing must be placed within two inches of any smoke flues. I notice that the framing is directly against *all* the flues.

Specifications require the outside of chimneys to be plastered opposite all timbering. This has been omitted by you. This is submitted for your information and proper action.

Very respectfully,

(Signed) J. S. PERKINS,
Superintendent.

(Testimony of James S. Perkins.)

I certify that the above and foregoing is a true copy of a letter sent to A. W. Boggs by me.

J. S. PERKINS,
Supt. & S. D. A. [83]

WITNESS.—(Continuing.) The paper you now hand me is a copy of a letter dated July 25th, 1905, addressed by me to the defendant, Augustus W. Boggs. The same is true of another letter bearing date of July 23d, 1905, from myself to Boggs, and the same is true of another letter addressed by me to said Boggs dated August 2d, 1905. The same is true of another letter dated August 10th, 1905, addressed by me to said Boggs. The same is true as to another letter addressed by me to Boggs August 17th, 1905. The same is true as to another letter dated August 22d, 1905, written by me to the same defendant. The original letters of which these are copies were mailed to the defendant Boggs with the frank necessary to carry them.

Mr. BOWEN.—If the offer is for the purpose of proving the contents of the letters, that is, the truth of the statements contained in the letters, we would object to them on the ground—

The COURT.—It doesn't prove that, of course. The witness must connect them up by showing at least from his standpoint that those were defects that he points out.

Mr. HORTON.—We don't offer them for the purpose of proving the truth of the statements.

The COURT.—Simply for the purpose of carrying notice. Of course if it is not followed up by the proof I have indicated, it amounts to nothing.

104 *The United States Fidelity etc. Co.*

(Testimony of James S. Perkins.)

Mr. BOWEN.—Yes, sir.

Mr. HORTON.—All of the letters now, if the Court please, so indentified [84] and examined by counsel for the defendant surety, I now offer in evidence. (Letter dated July 25th, 1905, marked United States Exhibit "D" offered and introduced and read in evidence as follows:)

United States Exhibit "D."

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, July 25, 1905.

A. W. Boggs,

Riverside, California.

Sir:

The specifications for the mess hall now under construction here by you call for the plastering to be done with patent mortar of approved brand, put on in accordance with the manufacturer's directions.

I desire that you inform me at an early date the name of the brand used, the amount, and from whom purchased.

This information must be forthcoming so that I may make my report to the Commissioner in an intelligent manner.

Very respectfully,

J. S. PERKINS,

Superintendent.

I certify that the above and foregoing is a true copy of a letter sent to A. W. Boggs by me.

J. S. PERKINS,

Supt. & S. D. A.

(Letter dated July 25th, 1905, marked United States Exhibit "E" offered, introduced and read in evidence as follows:) [85]

United States Exhibit "E."

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, July 25, 1905.

A. W. Boggs,

Riverside, California.

Sir:

Yesterday, while in conversation with Mr. Kincaide, presumably your foreman, he told me again that any protest from *any* Government official, inspector or otherwise, in regard to the work now under way here by you would be treated with contempt by him, and that this was in accordance with your orders. Will you kindly advise me by return mail if this is your position in this matter.

Very respectfully,

J. S. PERKINS,

Superintendent.

I certify that the above is a true copy of letter sent to A. W. Boggs by me.

J. S. PERKINS,

Supt. & S. D. A.

The COURT.—I suppose you are putting this in for the purpose of showing that the Government had a right to refuse to accept the building?

Mr. HORTON.—Yes, sir, and for the further purpose of showing that there was a wilful, noncompli-

106 *The United States Fidelity etc. Co.*

ance with the terms of the contract, if the Court please. [86]

The COURT.—Whether it was wilful or not, if the contract was not complied with of course the Government would not be required to accept the work.

(Letter dated July 23d, 1905, marked United States Exhibit "F" offered, introduced and read in evidence, as follows:)

United States Exhibit "F."

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station Boarding School,

Talklai, Arizona, July 23, 1905.

Mr. A. W. Boggs,

Riverside, Calif.

Sir:

Specifications for the Mess Hall now under construction by you at this school call for plastering to go to the floor. You have not done this in a single instance but have stopped it at the top of the wainscoting. You are short, therefore, on plastering to the amount of 445 square yards. This is submitted to you for your information and future benefit.

Very respectfully,

(Signed) J. S. PERKINS,
Superintendent.

I certify that the above and foregoing is a true copy of a letter sent to A. W. Boggs by me.

J. S. PERKINS,
Supt. & S. D. A.

(Letter dated August 2d, 1905, marked United States Exhibit "G" offered, introduced and read in evidence as follows:)

United States Exhibit "G."

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, August 2, 1905.

A. W. Boggs,

Riverside, California.

Sir:

You are informed that the plastering on the mess hall [87] now under construction by you is exceedingly unsatisfactory and cannot be accepted under any circumstances. It must all come off. If you intend to take it off and replaster you are hereby advised and notified not to send Mulford to do the work. I have seen all of his skill as a mechanic that I want to see, both here and at Truxton. Mulford told two of the mechanics here that he knew it was a poor job, and that all he gave a "damn" for was to get the money and get out as quick as possible. I thought the plastering at Truxton was poor, but it certainly makes a creditable showing compared with this. You are informed also that the door sills are made of 2 inch stuff instead of 4;—that the roof of the rear building has not been braced and trussed according to the specifications. This roof should be thoroughly braced and made safe.

Very respectfully,

(Signed)

J. S. PERKINS,

Superintendent.

108 *The United States Fidelity etc. Co.*

I certify that the above and foregoing is a true copy of a letter sent to A. W. Boggs by me.

J. S. PERKINS,
Supt. & S. D. A.

(Letter dated August 10th, 1905, marked United States Exhibit "H" offered, introduced and read in evidence as follows:)

United States Exhibit "H."

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,
Talklai, Arizona, August 10, 1905.

A. W. Boggs,
Riverside, Calif.

Sir:

Herewith please find a criticism by me upon the chimneys of the mess hall now under construction by you. These chimneys are the most poorly constructed of any that I have ever seen in my life. You are informed that they are all rejected. You are also informed that the partition walls are not bonded into the [88] outside walls and are therefore rejected. You are also informed that you have failed to brace the roof over the rear building, and one outside wall is pushed out at the top $\frac{3}{16}$ ths. of an inch. These will be rejected soon on that score alone if it is not immediately fixed.

You are informed that all the plastering, wainscoting, ceiling, window sash and window frames are rejected.

Specifications call for four windows 10" x 18" in

the cold storage with hammered glass $\frac{1}{2}$ " thick . You have substituted common window glass single thickness. These are all rejected.

You are informed that the sash weights are all too light, and allow the windows to drop to the bottom. These weights are rejected.

As to the window frames, you are advised that they are not box frames in accordance with the specifications and are not built in with the wall, and the openings filled with mortar as the specifications demand.

Very respectfully,
J. S. PERKINS,
Superintendent.

I certify that the above and foregoing is a true copy of a letter sent to A. W. Boggs by me.

J. S. PERKINS,
Supt. & S. D. A.

(Letter dated August 17th, 1905, marked United States Exhibit "I," offered, introduced and read in evidence as follows:)

United States Exhibit "I."

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, August 17, 1905.

A. W. Boggs,

Riverside, California.

Sir:

Your are informed that the work on the gables of the mess hall is not done according to the specifica-

tions of your contract, nor in a satisfactory manner. The shingles are not [89] of uniform size as demanded, but are put on in all widths. The frieze is not put on according to the plans, and the slats of the ventilators are not gained into the frame, but nailed into the end only. The work on these gables is done in an unmechanical style. It is rejected. This is in accordance with instructions from the Commissioner, knowledge of which you have in his letter to you of July 31.

Very respectfully,
(Signed) J. S. PERKINS,
Superintendent.

I certify that the above and foregoing is a true copy of a letter sent to A. W. Boggs by me.

J. S. PERKINS,
Supt. & S. D. A.

(Letter dated August 22d, 1905, marked United States Exhibit "J" offered, introduced and read in evidence as follows:)

United States Exhibit "J."

DEPARTMENT OF THE INTERIOR.

United States Indian School Service.

Rice Station School,

Talklai, Arizona, August 22, 1905.

A. W. Boggs, Riverside, California.

Sir:

Herewith I am sending by registered mail a resume of the discrepancies found in the Mess Hall now under construction at this school by you. As you are aware, I am directed by the Commissioner

of Indian Affairs not to accept work that is not performed in accordance with the specifications of your contract. In obedience to the orders of the Commissioner I hereby [90] notify you that all of this work not performed according to the specifications is not accepted.

Very respectfully,

(Signed) J. S. PERKINS,
Superintendent.

I certify that the above and foregoing is a true copy of a letter sent to A. W. Boggs by me by registered mail.

J. S. PERKINS,
Supt. & S. D. A.

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Discrepancies in MESS-HALL Now Under Construction at Rice Station School by A. W. Boggs.

(1) Specifications call for 13' ceiling in front building; 14' ceiling in rear building; The walls of the former have been lowered 3" *an* the latter 15".

(2) The roof of the front building is not framed in accordance with the plans and specifications—Specifications call for two purlins, 6" x 8" one to be at the foot of the principal and the other near the top; Contractor has substituted one purlin, 4" x 8", and placed it at about the center of the length of the rafter.

Specifications call for two bolts through the tie beam *an* principal. Contractor has used one bolt, 33" long, and placed it far enough from foot of principal for the bolt to reach through the principal and the

tie beam. The purlin placed where it is, and the bolt so far from the end has caused the principal to bend at least an inch already.

Specifications call for the rafters to be notched over the purlins; Instead of this a majority of rafters are above the purlins, and blocked up, many of them, as much as two inches. [91] Notching of purlins over principals has been omitted. The end of the purlin carried over the employes' dining-room is supported only by two ceiling joists. The roof of the rear building is not trussed at all, is not supported from the partitions, no ties are used to prevent it from spreading, and the partition walls show that the outside walls have been pushed out at the top $3/16''$,—and also that the top stones on the wall are being tipped, as the pressure is not straight downward.

(3) Specifications call for wall plates on rear building $2'' \times 12''$ and on front building $4'' \times 12''$. Contractor has substituted wall plates $2'' \times 6''$ on the front building and various sizes on the rear building; in many places $2''$ pieces two feet long, and all wall plates secured to the wall with nails.

(4) Specifications call for anchor bolts $5/8'' \times 33''$ every eight feet, at all angles and splices, and one on each side of every chimney; Contractor has not used an anchor bolt in the building.

(5) Partition walls are not bonded with the rest of the building but run up after the outside walls were completed.

(6) Chimneys:—

1—Chimneys between two dining rooms: Speci-

fications call for two flues, each to be nine inches square,—Contractor has put one flue, 6" x 2". The fireplace and flue are built against the wall after the wall was completed. The stone are not bonded into the partition wall, but the partition makes one side of the flue.

2—Chimney at south end of dining room is built same as above,—wall forming one side of flue, and not bonded. Where it comes out of roof it enlarges about four inches all around; lacks at least four feet of going to top of roof and is not stayed with an iron rod as shown in the plans. [92]

3—Chimney between the two kitchens as shown by the plans should be a three flue chimney,—each 9x9:— This as built is a one flue chimney, 8" x 28",—no partitions.

4—Chimney between laundry and ironing-room as shown on plans. Should be two flues,—9" x 12" each. This is built as two flues, each 8" x 10", and the chimney before reaching the roof is carried over to one side about half its size, making it dangerous and a very irregular flue.

Chimneys No. 3 and 4—The parts outside of the roof are built of white stone cut in layers about 8 inches thick.

Chimneys No. 1 & 2—and the bodies of *all* the chimneys, are laid of the same kind of stone, about 8 inches thick and 16 to 18 inches wide, and set on edge. The mortar of all is of pure quick-sand with only a trace of lime, and the mortar in *all* the chimneys can be easily and completely removed by shoving through an ordinary carpenter's rule, leaving great holes.

Chimney No. 3 is beginning to come to pieces. None are plastered on the outside as required opposite the timbers, and the framework is against all the chimneys. These chimneys are dangerous and are liable to burn the building down when the first fire is built.

(7) Plastering: Specifications call for patent plaster of approved brand, put on according to manufacturer's directions: Contractor has substituted quick-sand and water with very little lime. The plastering is very poor. Samples were sent to Indian Office August 2, 1905.

(8) Specifications call for all plaster to go to floor: Contractor has stopped at top of wainscoting in every instance, thereby making a great place for nests for rats and mice and snakes. About one third of the plaster was left off. [93]

(9) Specifications call for wainscoting to be $\frac{7}{8} \times 4$, clear, matched and beveled pine, sandpapered and made perfectly smooth; Contractor has substituted $\frac{3}{8} \times 6$ Douglas fir,—not clear, and not sandpapered nor made smooth.

Specifications call for a neat, moulded capping for wainscoting, details of which are shown on the plans; Contractor has substituted a beveled strip which can be pulled off with the fingers.

(10) Specifications call for a continuous nailing strip, 1" x 6", inserted as the walls and partitions are built, extending around four sides of the room, one at the floor level, and one of the same 2 and 4 feet above the floor respectively; Contractor has omitted all this, as well as all wood bricks required through

the building for nailing finish to, and substituting a strip of Oregon fir about $7/8$ " square, nailed to the stone, and where necessary to bring them out to a line, has used pieces of shingles and chips. The wainscoting is nailed to this with 3d. nails. There is no plaster behind wainscoting. A very poor job.

(11) Window Frames: Specifications call for box frames for all windows except the dormers,—to be solidly built into the walls, kept well braced and crevices filled with mortar: Contractor has not put in box frame. Frames were not built into the walls, but holes were trimmed out after walls were built, openings for windows being left while walls were going up, and frames inserted afterwards. Crevices which are from one to four inches are not filled with mortar. These crevices are so wide that in some instances they are not covered by window casing. The hanging styles were put on after the frames were inserted, and made to follow the irregularities of the stone, leaving the blind check irregular in width, varying from $3/8$ " to $1\ 1/2$ "; Specifications call for window stools to be made of $1-3/8$ " pine, nosed and returned [94] and moulded. Contractor has substituted $1-1/8$ " stuff, not moulded; frames held in place by two 10d. nails driven into top and bottom.

(12) Door frames: Remarks on the setting of window frames apply here. All door frames inserted after walls were completed, and to cover cracks a strip was nailed on the outside. There are eight outside door frames, with a space above frame 1 to 5 inches in width. This space is covered with an unsightly board of very common pine, the lintels

not having been brought down to the frame. All frames secured by nails driven through frame into stone wall; no wooden bricks used. Imposts are not moulded as required. Specifications call for doors 3 feet wide: Contractor has substituted doors 2' x 10".

Specifications call for door sills to be of 4" hard pine or oak, beveled: Contractor has substituted 2" soft pine, not beveled.

(13) Specifications call for windows in cold storage to be 10x12 hammered glass, $\frac{1}{2}$ " thick; Contractor has substituted common window glass, single thickness,—10" x 16".

(14) Specifications call for joists in bakery and ironing room to be 12" o.c.—Contractor has put them 16" o.c.

(15) Specifications call for stoop floors to be of 1-1/8" clear matched quarter-sawed yellow pine: Contractor has substituted 7/8" stuff, not quarter-sawed.

(16) Specifications call for treads of steps to be 1-3/8" clear, hard pine; Contractor has used 1-1/8 and 1 1/4 soft pine.

(17) Flooring: Specifications call for clear quarter-sawed matched yellow pine, 7/8" thick, etc. Contractor has used flooring of Oregon pine that is not clear nor quarter-sawed. It is mill-run lumber with many bastard boards.

(18) Flooring joists: In corridor flooring joists are not [95] set on the walls as the plans demand, but the joists rest on timbers blocked up from the ground.

(19) Ventilators: Specifications call for 9 ceiling ventilators, 2 feet square: Contractor has put in 12, 10" x 12".

(20) Specifications call for ceiling to be $\frac{5}{8}$ " clear, matched beveled pine: Contractor has made ceiling of $\frac{3}{8}$ " to $\frac{1}{2}$ " Oregon fir, not clear, but common lumber.

(21) Gables: Specifications call for frieze in all gables to be of triangular shape—shingles to be of uniform width: The frieze of base of triangle is left off in every gable, and no attention paid to uniformity of shingles. Ventilators in these gables are made in an unmechanical manner, the slats of which in no instance are gained, but merely nailed.

(22) Hearth borders: A strip $\frac{3}{8}$ " x $1\frac{1}{4}$ " beveled and nailed on top of floor, is put around the hearths: A poor piece of work.

(23) Hearths: Specifications call for trimmer arches for hearths: to be laid in cement, and hearths to be of selected red brick, laid on a bed of sand, and joints filled with mortar: Contractor has omitted the trimmer arches in every instance and substituted pine boards, nailed to joists. Has laid soft brick for hearth, the brick all having come from the old building. These are covered with a poor quality of cement in a thin layer. A very poor job.

(24) Window Weights: The window weights are too light. The sash weigh 46 lbs. The counter weights for these sash weigh 35 lbs., making them 11 lbs. short. The sash are not mortised, but braded, and are very cheap. All glass is single strength.

(25) Ice-box: Workmanship poor. Sheet iron,

not screwed down but nailed with a few nails. Outside doors are very crude and the material is shabby. There is a good deal of shabby material used throughout the ice-box. [96]

(26) Cornice: Made of unfit material: $\frac{3}{8}$ Oregon fir, much of which has already shrunk out of grooves. The frieze and fascia are made of common lumber, with plenty of loose knots. I counted one board 14' long with 14 knots in it, and another with 25. The frieze is standing away from the wall from $\frac{1}{2}$ " to $1\frac{1}{2}$ ", making a fine roost for bats.

(27) Batten doors in foundation wall are made in a shiftless manner. Some do not fill the space by 2" and one has dropped off. No screws nor clinch nails used in making these doors.

(28) Bridging: Specifications called for all floor joists to be bridged with herring-bone cross bridging, $1\frac{1}{2}$ " x 3", once in every 8' of span: bridging to be closely fitted, and secured with 10d. nails, 2 at each end: Contractor has omitted the bridging entirely in three rooms,—pantry, employes' kitchen and employes' dining-room. He has substituted 1" x 2" stuff, in other places in some places only one piece is used, and a nail in one end. The bridging is not fitted to the joists, is badly split and is a poor job.

Very respectfully,

J. S. PERKINS,
Superintendent.

(August 21, 1905.)

I certify that the above and foregoing is a true

(Testimony of James S. Perkins.)

copy of letter sent to A. W. Boggs by me by registered mail.

J. S. PERKINS,
Supt. & S. D. A.

WITNESS.—(Continuing.) The discrepancies referred to in United States Exhibits "D," "E," "F," "G," "H," "I," and "J," were as I found the facts to be in the examination of the building in course of construction as I have already testified.
[97]

The COURT.—I will ask you a question there. Did you find each one of the items mentioned in those exhibits in the actual work of the building, as you have stated it to be in those exhibits?

Ans. I did.

WITNESS.—(Continuing.) I have with me the plaster that I was asked for a moment ago. This plaster was actually taken from the building under discussion. (Witness produces pieces of plaster.) I do not remember what particular portion of the building I secured the samples from. The plaster was all the same kind throughout the building. I got this plaster myself out of the building. It is a fair sample of the plaster I obtained down there. These are the same samples of plaster that I took out of the building. I sent them to the Department at Washington. They are now in the same condition approximately as when they were sent to Washington, except that the plaster is in a little more powdered condition.

(The aforesaid samples of plaster are offered and filed in evidence as United States Exhibit "K.")

(Testimony of James S. Perkins.)

Referring to United States Exhibit "J" and particularly to the list marked "Discrepancies in Mess-Hall now under Construction at Rice Station School by A. W. Boggs," subdivision 9 thereof in particular, "Contractor has substituted beveled strip which can be pulled off with the fingers," it is a fact that the beveled strip on top of the wainscoting could be pulled off with the fingers. I made actual tests of that matter. The particular room where this actual test was made was in the rear building, I think perhaps in the kitchen. I think I did that when Mr. Charles was there in September. Mr. Charles is the supervisor of construction for the Department of the Interior. I took hold of the molding top of the wainscoting with my fingers, and [98] pulled off several feet—perhaps four or five feet. This is the wainscoting that was attached to the wall as offered by the defendant Boggs at that time. It was subsequent to the first day of September, 1905. The smaller piece of the two pieces of glass which I have in my hand, I got in the building. There had been a hail storm and it knocked out a lot of glass, so I went over and picked that up in the building. There was a lot of it lying on the floor. I think that was in August—I would not be sure—it might have been in September. This smaller piece of glass is the piece I sent to the Department of the Interior.

(The aforesaid small piece of glass offered and introduced in evidence as United States Exhibit "L.")

Referring to United States Exhibit "B," being a copy of the letter dated July 23d, 1905, and particularly to the following language therein.

(Testimony of James S. Perkins.)

"When I offered criticisms to Mr. Kincaid, presumably your foreman, his reply was that he would put the work in regardless of any protest on the part of the Government, and that this was according to your orders."

I recall having that conversation with Mr. Kincaid. That was along in the summer of 1905 sometime when Mr. Kincaid was there at work. I think he arrived at the reservation sometime in June but I could not be positive about that. The conversation was some time between the time when he arrived and when he left the reservation. I don't remember how long he was there. I went to Mr. Kincaid and spoke to him about the work. Told him that there was a lot of the work that was not satisfactory, and he replied that he would pay no attention to me: "I will pay no attention to you or any inspector: I will keep on driving nails. This is according to Mr. Boggs's orders." I think Mr. Boggs was at the building before the work started, [99] and he was there after it started: I know Mr. Boggs was there after the building was finished. That I remember very well. That was subsequent to the 1st day of September, 1905. I don't remember whether he was there at any other time before and after the work had begun was finished. I think I received some letters from Mr. Boggs in reply to United States Exhibits "B," "C," "D," "E," "F," "G," "H," "I" and "J," and I sent them to the Indian office. I did not receive a reply to United States Exhibit "B." United States Exhibit "J" is a résumé of the discrepancies for the most part of

(Testimony of James S. Perkins.)

the previous time that I had mailed to the defendant Boggs as I have testified. I rather think I received answers to those individual letters in that matter from the defendant Boggs, and if I did those letters were forwarded to the Indian office by me. Those were my orders from the Department.

I think I received an answer to United States Exhibit "J" from Mr. Boggs, and if I did I sent it to the Department. John Charles was there under orders of the Commissioner to inspect the building and make report on it. He inspected the building, and was there about a week. The list of discrepancies known in this case as United States Exhibit "J" was before John Charles in his work of inspection. The paper you hand me is a copy of a letter I mailed to Mr. Boggs in an envelope properly franked.

(Said paper offered, introduced and read in evidence as United States Exhibit "M.")

United States Exhibit "M."

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, Sept. 6, 1905.

A. W. Boggs,

Riverside, California. [100]

Sir:

You are informed that the United States Inspector is here examining the building recently erected by you. This is for your information. Should you desire to try to give him the rush on your

(Testimony of James S. Perkins.)

and Mulford's rascality every opportunity will be afforded.

Very respectfully,
(Signed) J. S. PERKINS,
Superintendent.

I certify that the above and foregoing is a true copy of a letter sent to A. W. Boggs by me.

J. S. PERKINS,
Supt. & S. D. A.

WITNESS.—(Continuing.) The paper you now show me is a copy of a letter addressed by me to Mr. Boggs dated September 16, 1905, the original of which I mailed properly franked to Mr. Boggs in Riverside, California.

(Said letter offered, introduced and read in evidence as United States Exhibit "N.")

United States Exhibit "N."

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,
Talklai, Arizona, Sept. 16, 1905.

A. W. Boggs,

Riverside, California.

Sir:

I have received your letter of August 28, and you are informed that the Commissioner of Indian Affairs was duly notified by telegraph, when you said the Mess Hall was completed. You are advised that it was inspected and reported upon by [101]

124 *The United States Fidelity etc. Co.*

(Testimony of James S. Perkins.)

Supervisor John Charles and myself. It is rejected.

Very respectfully,

(Signed) J. S. PERKINS,

Superintendent.

I hereby certify that the above and foregoing is a true copy of a letter sent to A. W. Boggs by me by registered mail.

J. S. PERKINS,

Supt. & S. D. A.

WITNESS.—(Continuing.) I received by mail the letter you now show me dated August 28th, 1905.

(Said letter offered, introduced and read in evidence as United States Exhibit "O.")

United States Exhibit "O."

Riverside, California, August 28, 1905.

Dr. J. C. Perkins,

Superintendent Indian School,

Talklai, Arizona.

Dear Sir:

Yours of August 21 with a memorandum of discrepancies received. All I can say in regard to the list is this. Let the Department send out their Inspector, and whatever in his judgment is necessary to make the work as per plans and specifications I am willing to pay. If it is left to you, kindly get some one who is not prejudiced to go over the work with you and I assure you your decision will be acceptable to me. Will you kindly notify the Department at once that I am ready to turn over the build-

(Testimony of James S. Perkins.)

ings, subject to the decision of the Inspector.

Trusting the above will be satisfactory, I am,

Truly yours,

A. W. BOGGS. [102]

WITNESS.—(Continuing.) I received by mail the letter you now show me dated October 18th, 1905.

(Said letter offered, introduced and read in evidence as United States Exhibit "P.")

United States Exhibit "P."

10/18, 1905.

Dr. J. S. Perkins,

Supt.

Dear Sir:

I have sent off another letter to the Department in regard to the Bldg. fearing my former letter miscarried. I was sick in bed when I wrote and intrusted the letter to my Docter to mail, I have had ample time for an answer—and am fearful of some delay kindly do not turn down the proposition. of letting the walls & Roof remain I am willing to allow whatever you or the department says is right—

Thanking you for the manner in which you recd me today

I beg to remain

Yours Very truly

A. W. BOGGS.

If you wire *you desisn* wire me at my expense

B.

WITNESS.—(Continuing.) The letter you now

126 *The United States Fidelity etc. Co.*

show me dated October 17th, 1905, is in the handwriting of and signed by A. W. Boggs.

(Said letter offered, introduced and read in evidence as United States Exhibit "Q.") [103]

United States Exhibit "Q."

Rice Station, Arizona.

10/17, 1905.

The Hon. Commissioner

Indian Affairs, Washington, D. C.

Respected Sir:

The undersigned A. W. Boggs, Contractor for Mess Hall at Talklia Arizona, begs permission to submit several memorandums in reference to the above mentioned building and asks you in justice to all to kindly render judgment on same—

Unfortunately for myself the building was not erected in strict accordance with plans and specifications but for every memo. short, additional work was done to cover any deficiencies. But I am here with men and materials in the way to tear down and make good any defect and I shall certainly do the best I can. At the same time I do not think I should be made to suffer a loss of several thousand dollars unnecessarily and I ask you to look the matter over carefully, and wire me at Riverside at my expense. Your decision.

The original plans calls for an Adobe building with details and specifications covering that class of building. There is also a note on page 2 allowing the contractor to modify the details to suit stone construction. This was done in providing nailing strips for wainscoting and the setting of window and door

frames I omitted laying in the 1/6 strips during construction, but plugged the walls afterwards and secured my ground to same a method used on all stone and brick construction. With adobe, this would not do as the adobe brick are *to* soft.

The window and door frames I left out leaveing a recess as per sketch and put them in afterwards. Dr. Perkins now insists I remove or tear down the entire building nearly four thousand dollars work of stone work simply to put in strips and frames as called for in adobe specifications. [104]

Dr. Perkins requested of me when I commenced work to change the exterior walls from rubble masonry to Rock face range work. *this* I did at a much greater cost than work called for—as he wished same to correspond with other new work—and he has always admitted & called others attention to this class of work.

The roof is a number one roof. *the* only fault that could be found is in the perlines and construction of trusses. *the* lumber called for I could not get as the Government mill who furnished me lumber shut down—In fact, I had great trouble in getting sizes wanted but I substituted sufficient materials to more than offset the change in sizes—I would like this roof to remain and am willing to allow what ever sum you think necessary rather than remove same for reasons given. If you would only send Mr. Charles or some one else competent to judge—I am satisfied matters could be adjusted to suit all parties, and I would be willing to pay their expenses if I could meet them here and go over the work with them.

128 *The United States Fidelity etc. Co.*

(Testimony of James S. Perkins.)

Trusting I may hear from you at an early date,
I beg to remain,

Yours very respectfully,

A. W. BOGGS.

WITNESS.—(Continuing.) The letter you now show me from A. W. Boggs, dated October 8th, 1905, I received through the mail. The letter is in Mr. Boggs's hand writing.

(Said letter offered, introduced and read in evidence as United States Exhibit "R.")

United States Exhibit "R."

Riverside, California, 10-8, 1905.

Dr. J. S. Perkins,

Supt. Talkia School,

Sir:

Your several communications recd and I am doing all [105] I can possibly do to start work—Men will be out first of the week to commence tearing down—and materials will follow—I note what you say in regard to walls I will take down what ever is necessary to make proper bonds with walls. I am not be able to come myself Monday, owing to severe sickness in my family—But Mr. Hopper and three others will go—

Very Respectfully Yours

A. W. BOGGS.

I have ordered fire proof Pulp Plaster for the Building and am expecting one of the Companys men to put it on.

B.

WITNESS.—(Continuing.) The letter you now

(Testimony of James S. Perkins.)

show me from defendant Boggs dated November 3d, 1905, is in Mr. Boggs's handwriting.

(Said letter and the letter to which the same refers, offered, introduced and read together as one exhibit, United States Exhibit "S.")

United States Exhibit "S."

Riverside California, 11/3, 1905.

Dr. Perkins,

Supt. [106]

Sir:

Your letter of the 28th rejecting the Fire Pulp Plaster I intend useing in Bldg. recd.—As *i* read the specifications it says to be of approved brand. *this* Pulp Plaster is used all over this state and they guarantee same. *but i?* you insist and state as you do I can not use same will you oblige me by stating just what brand you want The Alpine Co in Los Angeles has a ptd plaster which they guarantee and they send their own men to put it on. Will You accept this brand. *if* so kindly inform me at once. I intend raising roof of Building and adjust timbers as per plans. The walls I will increase in height—will also build frames into wall—and bond partitions—But I would like to know in regard to plastering so I can ship same with other materials. *and* you would oblige me by an early reply—I have written to El Paso in regard to flooring—

Very Respectfully

A. W. BOGGS.

130 *The United States Fidelity etc. Co.*

(Testimony of James S. Perkins.)

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, October 28, 1905.

A. W. Boggs,

Riverside, California.

Sir:

You are informed that your proposition to use pulp plaster upon the Mess Hall is not in accordance with the specifications and will therefore be rejected.

You are further advised that no variations from the specifications will be permitted.

Very respectfully,

J. S. PERKINS,

Superintendent. [107]

WITNESS.—(Continuing.) The house burned on November 4th, 1905. The paper you now show me is a copy of a letter I wrote to the defendant, A. W. Boggs on September 23d, 1905, which I mailed to the said Boggs in an envelope properly franked.

(Said letter offered, introduced and read in evidence as United States Exhibit "T.")

United States Exhibit "T."

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station Boarding School,

Talklai, Arizona, Sept. 23, 1905.

Mr. A. W. Boggs, Riverside, Calif.

Sir:

In the name of the Government of the United

States I hereby demand that you deliver to me immediately and in exact accordance with the specifications of your contract the Mess Hall erected at this school by you, said contract being with the Commissioner of Indian Affairs upon the part of the United States and dated February 23, 1905, and approved by the Secretary of the Interior March 27, 1905.

Very respectfully,
(Signed) J. S. PERKINS,
Superintendent.

I certify that the above and foregoing is a true copy of a letter sent to A. W. Boggs by me by registered mail.

J. S. PERKINS,
Supt. & S. D. A. [108]

(The following letter offered, introduced and read in evidence without objection as United States Exhibit "U.")

United States Exhibit "U."

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs.

Washington, October 27, 1905.

Mr. A. W. Boggs,
Riverside, California.

Sir:

This is in confirmation of telegram to you dated to-day, as follows: "Mess Hall at Rice Station must be reconstructed in exact accordance with plans and specifications. No variations will be permitted."

In your letter of the 17th inst. to the Commis-

sioner of Indian Affairs you ask permission to submit memoranda in reference to the mess hall at Rice Station, Arizona, and ask that a decision on the same be rendered. You state that the building was not erected in strict accordance with the plans and specifications but where any part was short additional work was performed to cover the deficiency and that you are now at Rice Station with men and materials on the way to tear down and make good any defects.

You state that you should not be required to stand an unnecessary loss of several thousand dollars, and ask that the matter be carefully considered. You further state that the original plans call for an adobe building, and that the details and specifications are for that class of building, but a note on page two allows the contractor to modify the details to suit stone construction, which you say was done in providing nailing strips for window and door frames; that you omitted laying in [109] 1/6 strips but plugged the walls afterwards and secured your ground to same, a method which you say is used in all stone and brick construction, but with adobe would not do as the adobe brick are too soft. The window and door frames you left out, leaving a recess and putting them in afterwards.

You state that Superintendent now insists that you remove or tear down the entire building—nearly four thousand dollars worth of stone work—simply to put in strips and frames as called for in the adobe specifications.

You claim that the roof is a No. 1 roof, the only fault that could be found being in the purlins and

(Testimony of James S. Perkins.)

construction of trusses; that you could not get the lumber called for, as the Government mill furnishing you with lumber shut down; that you had great trouble getting the size wanted but you substituted sufficient materials to more than offset changes in size; that you wish this roof to remain and that you are willing to allow whatever sum seems necessary to this office, rather than remove it, for the reasons stated.

You ask that Supervisor Charles, or someone competent to judge, be sent to adjust matters.

In reply you are advised that this office expects you to follow exactly the plans and specifications already furnished you for the reconstruction of this building. No departures will be allowed and unless the building is constructed exactly as specified it will not be accepted. A thorough inspection of this building has already been made by Supervisor Charles, who recommended that it be rejected, and it is plainly seen from this report that the building is unsafe and cannot be used for any purpose whatever.

If it is necessary to tear down the walls in order to make the building as it should be, this office can give you no [110] relief. The report on the roof is that it is unsafe and has already settled in one corner. Nothing, however, will be accepted but the building as required.

Very respectfully,

C. F. LARRABEE,

Acting Commissioner.

WITNESS.—(Continuing.) The building was

(Testimony of James S. Perkins.)

burned the night of November 4th, 1905, about ten o'clock. I was present at that time. Mr. Kincaid arrived I think in June, and my attention was called to the walls by Mr. Carroll especially pointing out that the partition walls were not bonded to the outside walls, and just exactly when that was done I don't remember. As to the recesses for window frames and door frames in the walls, as they stood before the arrival of Mr. Kincaid, I don't know whether it was before or after, but Mr. Carroll called my attention to that. There were openings left for the window frames and door frames, and they were placed in the walls afterwards, and adjusted afterwards to the walls. The defendant Boggs called at Rice Station School in October, 1905, I think. He came to see me at my office and talk matters over with me—my office was in my house on the school grounds. He wanted the walls to stand and he told me that he had the building insured also. I don't remember the whole conversation. Mr. Boggs was probably in the office five minutes—five or ten minutes—a few minutes. I don't remember whether anything was said about the roof. I know we talked about the building.

According to this letter that I wrote to the Department after Mr. Boggs called, we had some conversation with regard to the roof standing and with regard to the wall standing. I think [111] Mr. Boggs wanted the walls to stand—didn't want to take the walls down. I think he wanted to make the roof as specified. I rather think he so stated to me, and it was immediately thereafter that he wrote to

(Testimony of James S. Perkins.)

me United States Exhibit "P." The two pieces of wood which you show me were taken out of one of the walls by Supervisor Charles when he was inspecting the building. I was present and saw him take them out.

(Pieces of wood shown to counsel for defendant.)

I think they were taken out of the partition wall between the bakery and cold storage in the rear portion of the structure, Mr. Charles took them out himself and I saw him. I rather think they are in practically and substantially the same condition as when they were removed at that time. I think they are about the same. I do not observe any changes or difference.

(The aforesaid pieces of wood offered and filed as United States Exhibit "V.")

The piece of wainscoting which you show me came from the ground—sawed off; lumber of that character and kind was used in the Boggs building—that is a sample of the building; it was used as wainscoting in the building. There was no wainscoting of any other class or character than the sample now exhibited used in the building. That is the kind of wainscoting that was used in the building.

(Said piece of wood offered and filed as United States Exhibit "W.")

Cross-examination.

(By Mr. BOWEN.)

I am a physician. I think I took charge of the Indian School at Rice Station—over five years ago. I guess I went there before 1905. I was there before

(Testimony of James S. Perkins.)

Mr. Boggs commenced work on this contract. I believe I took charge the 17th or 15th of November—at any rate it was in November before. I had never been in the building business. I had never been a contractor or architect. [112] I never had any experience of that kind at all. I had previously had charge of the Truxton Canyon School, and there was a small building put up there under my supervision. That was the only experience I had ever had in that way. My experience was very limited in the construction line. I don't pretend to be an expert on these matters of construction—not at all—no, sir.

(Question by Mr. BOWEN.)

In fact, don't you remember, Doctor, having a talk with Mr. Hopper who was there representing Mr. Boggs, about the 21st of October, 1905, in which you told him that the Department ought to have sent a man there to superintend the construction as you were not competent to do it—you didn't know how to judge what was right?

Ans. I don't remember telling Mr. Hooper that, but that was the way I felt at any rate.

Q. Yes, you would say that now?

Ans. I would; yes, sir.

Q. Do you remember having a conversation in November with him to the same effect?

Ans. With Mr. Hopper? No, sir, I don't remember having a conversation with him, but I am quite sure that I made such remarks.

Q. You subscribe to those sentiments now, do you?

Ans. Yes, sir.

(Testimony of James S. Perkins.)

Q. I understood you to say that the first time your attention was called to these alleged defects was a few days prior to the 21st day of July, by Mr. Carroll. Is that right? Ans. Yes, sir.

Q. You hadn't examined the building prior to that time?

Ans. Well, I had examined it as far as I was competent to examine it. I had been in it a good deal. As I told Mr. Hopper, [113] or whoever it was I did tell I was not competent to make a critical examination of it.

Q. You were there in the employ of the Government for that purpose though, were you not?

Ans. Well, I was the superintendent of the school. The Department looked to me to report on the building.

Q. Wasn't it one of your duties, as I understood you to testify, to keep track of the progress of the work and to report to the Government?

Ans. Yes. I considered that my duty.

Q. And that you did, did you not?

Ans. Yes, sir.

Q. But you didn't believe yourself competent to do so?

Ans. I didn't. No, sir. I didn't think I was competent.

Q. You were there every day on the work, weren't you, from the time it began?

Ans. Yes. Practically every day.

Q. Isn't it a fact that almost all of the informa-

(Testimony of James S. Perkins.)

tion you have given us came to you from Mr. Carroll?

Ans. The technical information in regard to the building?

Q. Yes. Ans. Yes, sir, that is true.

Q. That is a fact? Ans. Yes, sir.

Q. And the first time he talked to you about it was somewhere about the 21st of July, was it? The date of the report that you refer to?

Ans. Well, I don't remember just when he did talk to me about it, Mr. Bowen; along about that time somewhere. I couldn't fix the date.

WITNESS.—(Continuing.) My reference in my examination in chief to purlins and joists and wall plates and the like, all that information was [114] given me by Mr. Carroll, but I looked into the items myself after Mr. Carroll told me about it. The wall-plates are plates up on top of the wall; boards. They are not necessarily hidden. I have seen them placed right on top of the walls screwed down with bolts. You can see them in this building. The whole roof was over the two wall-plates. You could see them in the attic. I did see them in the attic. I don't remember just when it was that Mr. Carroll called my attention to it and I got up in the attic to examine the wall-plates. I was up in the attic a good many times. That might have been in August—I think it was before September. I couldn't say that I saw those wall-plates put in. I was on the ground there every day. The house where I lived is probably a hundred and fifty yards from the

(Testimony of James S. Perkins.)

construction. I don't know how much of the time during the day I was on the job. I had my other regular duties to attend to. I was going back and forth and dropped into the building occasionally, before and after I got through with my duties at the school. I didn't have any regular time. I just dropped in during the course of the day. Some time almost every day I think. At the time Mr. Carroll called my attention to these things about the 21st or 22d of July, I guess the walls were up. There was quite a good deal of it completed. I don't remember whether the roof was on or not. I think the plaster was on. Possibly some of the floors were down. I don't remember whether all the floors were. I could not tell which of the floors were down. I think the fireplaces and chimneys were in. A purlin is a timber that goes around the top of the principals and trusses that the rafters rest on. A purlin is visible after the building is completed, but not without going up into the attic. There were two purlins specified. I did not find those two there. I found one—somewhere near the middle of the rafter—the principal rafter. Mr. Charles measured it. His measurements were in his report. I [115] think I saw Mr. Charles measure it. That roof slopes from the ridge in the middle of it. There is a purlin on one side of the roof where the specifications require two—one at the top of the rafter and one at the bottom. I don't remember on which side. There are two slopes to the roof. There was one

(Testimony of James S. Perkins.)

purlin instead of two on each side.

(Question by Mr. BOWEN.)

Look at this plan and state whether that shows anything more than one purlin on each side. (Counsel handing paper to witness.)

Mr. HORTON.—We object to the question as calling for a conclusion as to a matter that speaks for itself.

COURT.—I guess that objection is good unless he is an expert. If he is an expert and there is any obscurity about the plan, you may ask him to explain it.

Mr. HORTON.—He does not claim to be an expert.

WITNESS.—(Continuing.) It is a fact that the fireplace in the employees' mess-hall was cut out at my direction. It might be that the flue left up was the flue belonging to the fireplace left in. I am aware of the fact that the United States Government paid Mr. Boggs two payments. The second the 21st of July, 1905, and the first one on the 10th of June, 1905. Those payments were made on estimates which were approved by myself and Robert A. Smith, the Government inspector. Mr. Smith is the school engineer. He lives at the school. I asked him to help me inspect the building. Looking at the certificate now handed me dated June 30th, 1905, I recognize Mr. Smith's signature and my own.

(Counsel for United States Fidelity and Guaranty Company here offers the aforesaid certificate dated June 30th, 1905, and another certificate dated

May 23d, 1905, counsel for plaintiff [116] consenting that they may both be included in the same offer. Counsel for plaintiff objects to the introduction of said two certificates in evidence, and said objection is argued to the Court.)

The COURT.—I shall make this disposition of the testimony: I shall let it go into the record with the understanding that if on the argument of the case I conclude it is incompetent, it will be excluded.

(Papers offered, introduced and filed in evidence as Defendant's Exhibits No. 1 and No. 2 for Identification. The said exhibits are in words and figures following to wit:)

Defendant's Exhibit No. 1.

(For Identification.)

THE UNITED STATES

to **AUGUSTUS W. BOGGS, Dr.**

For first payment on Mess Hall and Kitchen erected at Rice Station School, Talklai, Arizona, under contract between the Commissioner of Indian Affairs and Augustus W. Boggs, dated February twenty-third, 1905, being eighty per centum of the value of the work executed and actually in place—as provided in Section 9 of said contract—viz.:—

853 perch of stone at \$4.50 \$3838.50

61800 feet of lumber at \$26.00 1606.80

\$5445.30

Less 20% 1089.06

Balance \$4356.24

Dated May 23, 1905.

142 *The United States Fidelity etc. Co.*

I certify on honor that I have carefully inspected for the Indian Department, work described in the foregoing and find it to be actually in place and of the value represented; that it has been done in a workmanlike manner and that the stipulations of the contract have so far been fully complied with.

Dated at Rice Station School, Talklai, Arizona,
May 23d, 1905.

ROBERT A. SMITH,
Engineer. [117]

I certify on honor that the foregoing account of Augustus W. Boggs is correct and just; that the work has been carefully inspected by Robert A. Smith whose certificate appears above; that the stipulations of the contract have so far been fully complied with; that there is now due the said Augustus W. Boggs four thousand, three hundred and fifty-six dollars and twenty-four cents, no part of which has been paid, and that I have issued this voucher in duplicate only.

Dated at Rice Station School, Talkalai, Arizona,
May 23d, 1905.

J. S. PERKINS,
Superintendent.

Defendant's Exhibit No. 2.

(For Identification.)

THE UNITED STATES

to AUGUSTUS W. BOGGS, Dr.

For second payment on Mess Hall and Kitchen
erected at Rice Station School, Talkalai, Arizona,
under contract between the Commissioner of Indian

Affairs and Augustus W. Boggs dated February 23, 1905, being eighty per centum of the value of the work executed and actually in place, as provided in Section 9 of said contract—viz.:—

256 perch of stone at \$4.50.....	\$1152.00
800 yards of plastering at 50 cts. per yard..	400.00
2 fireplaces at \$25.00 each.....	50.00

(Lumber):

Floor joists	6860 feet
Ceiling joist	3400 "
Roof & Trusses.....	9726 "
Roof sheathing	8000 "

Total number feet of lumber 27986 feet
at \$39.00 p. m.....1091.45

[118]

3100 shingles at \$7.50 per M.....	232.50
Iron work, \$25.00: Valley \$100.00	
Ventilators, \$48.00, tot.....	173.00
Plumbing & Gas fittings.....	1325.00

\$4423.95

Less 20% 884.79

Balance\$3539.16

Date, June 30, 1905.

I certify on honor that I have carefully inspected for the Indian Department the work described in the foregoing, and find it to be actually in place and of the value represented; that it has been done in a workmanlike manner and that the conditions of the contract have so far been fully complied with.

(Testimony of James S. Perkins.)

Dated at Rice Station School, Talklai, Arizona,
June 30, 1905.

ROBERT A. SMITH,
Inspector.

I certify on honor that the foregoing account of Augustus W. Boggs is correct and just; that the work has been carefully inspected by Robert A. Smith, whose certificate appears above; that the stipulations of the contract have so far been fully complied with; that there is now due the said Augustus W. Boggs Three thousand, Five hundred and Thirty-nine dollars and Sixteen cents,—no part of which has been paid—and that I have issued this voucher in duplicate only.

Dated at Rice Station School, Talklai, Arizona,
June 30, 1905.

J. S. PERKINS,
Superintendent. [119]

The COURT.—I think I will put it a little differently. I will let the matter that has been read go in, and I will reserve my ruling on the competency of the testimony until the argument; but of course it goes into the transcript with that statement, but I reserve my ruling on the result until the final argument. Mark them for identification. Very well, go on, they are marked for identification and the ruling reserved.

Mr. BOWEN.—Will you tell the Court, Dr. Perkins, at what stage had this building arrived on the 30th of June, 1905?

Ans. On the 30th of June?

(Testimony of James S. Perkins.)

Q. Yes, sir. How much of the work had been done?

Ans. The date of that second certificate—when is the date of that?

Q. The 30th of June, 1905.

Ans. About what the certificate states.

Q. The statements of the certificate are correct, are they, as to that?

Ans. I think they are.

WITNESS.—(Continuing.) These certificates were sent to Washington by myself and have been in the hands of the Government ever since. I think they are required to be issued in duplicate or triplicate. I don't remember.

The COURT.—Where did you get those certificates from?

Mr. HORTON.—Furnished me by the plaintiff.

Mr. BOWEN.—These were furnished on my demand by the plaintiff in the case.

WITNESS.—(Continuing.) I don't remember whether all of the stone work was done at that time or not. There was quite a lot of the stone work done. I rather think the walls were all up. I couldn't say positively whether the partition walls were all up. Perhaps the [120] roof was going on. I don't remember for sure. I remember very well when the fireplaces and chimney were built; I remember seeing them going up, but I couldn't fix the date. I don't know whether before or after June 30th. I can't fix the date. I wouldn't swear whether the floors were down at that time or not. There were a

(Testimony of James S. Perkins.)

great many things I knew about all of them and a great many things I have forgotten. A few dates I remember. I said the building was finished—I had reference to this time the contractor said it was finished. That was about the 1st of September. It might have been the last of August. I don't remember whether it was the 16th or 17th of August or not. I remember it was supposed to have been finished on time. That date would be on time September 1st. I don't know whether the roof timbers were in place on the 30th of June. I have no recollection about that. The plastering was on after the walls were up. I don't know whether it was all finished or not. It was finished when I made the certificate and issued the voucher for it. That was the 30th of June. If the voucher says so I think that is correct.

Looking at the list of work in place in Defendant's Exhibit 2 for Identification, to the best of my knowledge and belief, that list is correct on that date. I think it was correct on that date. Looking at the certificate of May 23d, Defendant's Exhibit 1 for Identification, I think that is correct, and the work in place specified there is correctly specified. It is correct that up to the 23d of May, 1905, Boggs had put in work there and materials to the value of \$5,435.30, and on the 30th of June he had put in work up to that time and since the 23d of May work and materials of the value of \$4,423.95.

In my opinion, when I made these certificates, Mr. Boggs was entitled to that money. I do not know how many perches [121] of stone there are altogether in

(Testimony of James S. Perkins.)

that building. I do not know whether the stone mentioned in these two papers is all the stone in the building. I don't know how many perches there would be in the building. I am not familiar with that subject. I couldn't say whether the 800 yards of plastering specified in the second certificate represents all the plastering in the building, because I don't know how many yards of plastering there were. It is a fact that the two fireplaces mentioned in the certificate of June 30th were in place at that time, and all the stone and plastering which are mentioned in that certificate were also in; the chimneys were also in. I don't remember whether they were in in connection with the fireplaces or whether they were flues. There were some flues and some connected with the fireplaces. The chimneys or flues in connection with these two fireplaces were in if I put them in the voucher. I couldn't say whether the chimneys were in. It is a fact, as mentioned in this certificate, that the roof and trussing were in. That includes the purlins. They were all in at that time. It is a fact that I requested Mr. Boggs to change the hearths for those fireplaces from brick to cement and he did so.

(Question by Mr. BOWEN.)

Were you authorized or requested or directed by the Government to report what you found with reference to the progress of the work? Ans. Yes, sir.

Q. You sent on reports from time to time?

Ans. Yes, sir.

The COURT.—Was that a written or verbal authority? Ans. I think it was written.

(Testimony of James S. Perkins.)

WITNESS.—(Continuing.) The roof which was mentioned in this report or certificate of June 30th was in if it is mentioned there. The same applies to the floor joists and ceiling joists, and to everything [122] in it. I don't think 31,000 shingles would cover the building. That is the most I know about it. I saw where the ventilators were in the building at the time I made this certificate. I didn't make any objection to them. I don't remember whether there are three ventilators placed in the mess-hall instead of two as required by the specifications. I saw the windows and door frames at that time. I made no objection to anybody about them. I didn't make any objection until Mr. Carroll told me.

The COURT.—When was it you say Mr. Carroll told you? Ans. Along the latter part of July.

Q. You made no objection to any of the work until that time? Ans. Yes, sir.

Q. Then Carroll pointed out the defects as you now claim them, and then you called the attention of the contractor to them? A. Ans. Yes, sir.

Q. About the 21st of July? Ans. Yes, sir.

Q. (By Mr. BOWEN.) How is it you are able to remember that date and no other?

Ans. I refreshed my memory on that, and I read a letter Mr. Horton shows—it was dated—

Q. That letter was made up from Mr. Carroll's statements altogether?

Ans. Yes, sir; except that—I verified the statements Mr. Carroll made to me.

WITNESS.—(Continuing.) I don't know how long

(Testimony of James S. Perkins.)

Mr. Carroll had been there at the school. I don't know when he was appointed. I think he was there all the time this work was going on. He was on the ground. [123] I don't know whether he went around and examined the building or not. I didn't tell him to. He was there on the ground—he couldn't help seeing—whether he gave it a careful, critical examination I don't know. Up to about the 21st of July Mr. Carroll said nothing to me about any defects in the building. At that time he just came to me and told me about it. He said it wasn't being erected as it should be—there was mighty poor work being done on it, and I asked him to point out the defects to me and he did so. That was after the roof was on, the floors down, the fireplaces and chimneys up, and the plastering on, and about \$9,968 worth of work in place. Yes, sir. That was after the vouchers were issued. Before the building reached that stage he hadn't mentioned the matter to me. I don't know that Mr. Carroll put it in writing at all. I wrote it down myself from his dictation.

I don't know when Mr. Carroll obtained the information on which he based that report. I pulled off that bit of wainscoting in September myself while Mr. Charles was there. That was the first time I had done it. Mr. Charles was there in September—the early part of September. Sometime after the first—it was the early part of September, I remember that. Mr. Carroll told me it could be pulled off with the fingers very easily. I hadn't tried to pull it off—I didn't try to pull it off; I think, until Mr. Charles came there. As far as I was competent to judge, it looked all right

(Testimony of James S. Perkins.)

to me. Mr. Charles was never on the job prior to the early part of September. There was nobody there on behalf of the Government except myself and Mr. Smith, who was the engineer employed at the school. Mr. Smith was not a builder or contractor. This bit of wood introduced in evidence as United States Exhibit "V" came from the walls in the rear building. I found it lying loose in the joints. [124] I don't know who put it there. It was stuck into a good-sized crack. It might have been stuck in by some of the Indians at my school or anybody as far as I know. The piece of wainscoting introduced as Exhibit "W" I don't think is as specified—I don't think it was the same width or thickness as specified. Some time in October, I think, Mr. Boggs began to tear down and to rebuild. Mr. Hopper and Mr. Rollins and another man, who said his name was Calhoun, were there for that purpose at that time. I don't remember when they got there. I remember the night they came, I saw them, but I don't remember the date. It was the latter part of October, I think, I had the conversation with Mr. Boggs. I rather think the work of reconstruction had commenced before that. Prior to the time of the fire the floors were taken up and the wainscoting was taken off and the windows were taken out and doors, and they were piled up, and I think Mr. Hopper and Mr. Rollins were dressing the floors and smoothing it up—Mr. Hopper told me Mr. Boggs instructed him to smooth the floor up and use it for wainscoting. I think that was all that was done. I don't think they took the plaster off,—per-

(Testimony of James S. Perkins.)

haps they did. I would not say whether they did or not. No work was done on the joists that I remember of.

The flooring and the window frames and the windows and a lot of stuff like that were piled up on the joists in piles. I don't remember anything else that was done at that time. After the fire Mr. Boggs' men came back for the purpose of building up again. Mr. Hopper had charge of the work, and Mr. Rollins was there. They came before the fire and stayed afterwards. They went away finally but not before they had to go away. *Perhpas* Mr. Rollins went away. I think Mr. Rollins went first. After the fire they started to take down the stone and clean it up for the purpose of rebuilding. The stone was all alike—it [125] all comes out of the same quarry. There is a big stratum of it out on the desert; it is all about the same. The stone was satisfactory—the stone was all right. They piled up the stone after the fire. Some of it was cleaned up and piled in piles around the building. Mr. Hopper and the others who were doing work there on the reconstruction, left two or three days after they were ordered off. I ordered them off by order of the Commissioner of Indian Affairs under authority from the Department of the Interior.

Q. Have you that written authority here?

Ans. No, sir; I have not it with me.

Mr. BOWEN.—Has counsel for plaintiff that?

Mr. HORTON.—No, I think not.

The COURT.—There is no controversy about that.

Mr. HORTON.—The Government ordered a cessa-

(Testimony of James S. Perkins.)

tion of the work.

Mr. BOWEN.—Is this the notice which you mailed to Mr. Boggs? (Counsel handing paper to witness.)

Ans. Yes, sir.

Mr. BOWEN.—I offer this in evidence.

Mr. HORTON.—No objections.

(Letter offered, introduced and read in evidence as Defendant's Exhibit No. 3.)

Defendant's Exhibit No. 3.

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School.

Talklai, Arizona, Dec. 28, 1905.

Augustus W. Boggs,

Riverside, California.

Sir:—

By order of the Commissioner of Indian Affairs dated [126] December 19, 1905, approved by the Secretary of the Interior and the Attorney General of the United States, you and your representatives are now informed that you must vacate the San Carlos Reservation at once. It is also required and ordered that all material and property of all kinds furnished by you and your representatives for the building of the Mess Hall at the Rice Station School, Arizona, must not be molested and must remain intact.

You must comply strictly and promptly with this order.

Very respectfully,

J. S. PERKINS,

Superintendent.

(Testimony of James S. Perkins.)

WITNESS.—(Continuing.) I gave a similar letter to Mr. Hopper, in the latter part of December. I don't remember the date. I gave him a letter the day I wrote the notice. Up to the time I gave him that letter he was going about his business getting the building ready for reconstruction. At that time Mr. Hopper had taken the walls down and cleaned up a lot of stone, and Mr. Boggs had shipped in some material—some lumber—and a little hardware and shingles and that kind. I don't remember how many car loads had come in at that time—quite a lot of lumber, though. I would not be able to say how much. I seized that under the order of the Department of the Interior, and that has not been returned to Mr. Boggs or anybody on his behalf; neither have the stones taken down from the building. That material and stone work was used in the construction of the building afterwards by the new contractor, Mr. Owen. Mr. Hopper didn't go for two or three days and the Department directed me, if they didn't go, to call on the United States Indian Agent at San Carlos to put them off the reservation. The statement in the letter of December 28th, [127] Defendant's Exhibit No. 3, that I had a letter from the Commissioner of Indian Affairs dated December 19th, is correct. I don't remember when I received that letter. I received it probably four or five days after it was mailed in Washington. I think it was a few days before I gave this notice to Mr. Boggs and Mr. Hopper. Two or three days or such a matter. I couldn't swear positively to that, because I don't remember

(Testimony of James S. Perkins.)

the date I received the letter from the Department. I think I had it a few days before I gave the notice to Mr. Hopper. I don't remember whether this material came in between the time I got my letter from Washington and the time I gave Mr. Hopper notice. I know there was a lot of material there.

The COURT.—Are you contending for the value of that material? How does it affect the issue—suppose the Government did it unjustly?

Mr. BOWEN.—We intend to counterclaim for the proper value of it and claim that as an offset.

Mr. HORTON.—He moves to amend the pleadings.

Mr. BOWEN.—If necessary we will ask to amend for that purpose.

The COURT.—Do you want to amend for that purpose?

Mr. BOWEN.—Yes, sir; we would like permission to set up the value of those materials.

The COURT.—All right.

Mr. HORTON.—I will say in this connection as to those materials there will be no dispute. That is, we admit that there were certain materials on the ground at the time the work was ordered stopped, and we are willing to make an allowance for it.

The COURT.—That would seem to be fair and just if you are entitled to recover, *that* that should be an offset. [128]

Mr. BOWEN.—And the only issue will be the amount?

Mr. HORTON.—Yes, sir.

WITNESS.—(Continuing.) My attention being called to a letter now handed me from myself dated

(Testimony of James S. Perkins.)

September 1st to A. W. Boggs, I identify that letter as having been sent to Mr. Boggs by me. The paper which is now handed me is a copy of a letter addressed to me by Mr. Boggs dated September 24th, 1905, of which I think I got the original. The letters now shown to me dated October 3d, 12th and 23d signed by myself, addressed to Mr. A. W. Boggs were signed by me and mailed to Mr. Boggs.

(Letter of September 24th, 1905, offered, introduced and read in evidence as Defendant's Exhibit No. 4.)

Defendant's Exhibit No. 4.

Riverside, California, September 24th, 1905.

Dr. J. S. Perkins,

Sup't Indian Schools,

Talkia, Arizona.

Sir:

Your notice of rejection of building by yourself and Mr. Charles received. I have been waiting for notice from the Department with an itemized list of work to be done as I expected Mr. Charles would send same, is the reason I have not answered your communication.

I am ready and willing to send men and materials and do over any work necessary to satisfy you and the Department. And if you will send me a list of work to be done I'll attend to the matter at once. As to the plastering, I don't think any one can do a better job than is now on, on account of the porous rock. The moment plaster is applied the absorption is so great [129] that it leaves the mortar void of all binding qualities. Now, I am willing to paper the

entire building with any kind of paper you say, and if you are not satisfied with paper, I'll cover the walls with pressed ceiling and paint same. While this procees will cost double the amount of plaster, I would much rather go to this expense and get it right than replaster the walls, as I am satisfied I could not do a good job.

Will you consider this proposition and send me a memorandum as early as possible, and will you recommend the Department to allow me additional time to do the work over. While I know it will cost me several thousand dollars, I am anxious to go to work and make good. If you so desire, I will come out and go over the work with you at any time.

Trusting you will consider my wishes, I beg to remain,

Yours fraternally,

AUGUSTUS W. BOGGS.

(Letter of October 3d, 1905, offered, introduced and read in evidence as Defendant's Exhibit No. 5.)

Defendant's Exhibit No. 5.

DEPARTMENT OF THE INTERIOR.

Indian School Service.

Rice Station School.

Talklai, Arizona, October 3, 1905.

A. W. Boggs,

Riverside, California.

Sir:

Referring again to your letter of September 24th, and especially to your intention of doing your work over, you are again informed that I will not receive any work by Wm. L. Mulford, that I will not receive

the building at all until it is erected in *exact* accordance with the specifications of your contract.

[130] You are again informed that the walls must come down and be built up properly, viz., all partitions must be properly bonded,—all walls true,—all windows and door frames properly made and built into the walls according to specifications,—nailing strips for finish, &c. You are informed, to make a long story short, that there are only 3 parts of the work of this particular building properly done;—painting, plumbing and the shingles on the roof. All the rest is a public disgrace. There must be some evidence of activity on your part at once, as the Government at Washington desires that I inform the proper authorities by telegraph.

You are advised for the last time that *nothing* will be considered except the erection of the building at the very *earliest* possible date in *exact* accordance with the specifications.

Very respectfully,

J. S. PERKINS,
Superintendent.

(Letter of October 12th, 1905, offered, introduced and read in evidence as Defendant's Exhibit No. 6.)

Defendant's Exhibit No. 6.

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, October 12, 1905.

A. W. Boggs,

Riverside, California.

Sir:

Will you please give a positive answer "yes," or

158 *The United States Fidelity etc. Co.*

(Testimony of James S. Perkins.)

"no," by the next mail to the following question:

Do you intend to rebuild the Mess Hall immediately in *exact* accordance with the specifications of your contract?

Very respectfully,

J. S. PERKINS,

Superintendent. [131]

(Letter of October 23d, 1905, offered, introduced and read in evidence as Defendant's Exhibit No. 7.)

Defendant's Exhibit No. 7.

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, October 23, 1905.

A. W. Boggs,

Riverside, California.

Sir:

I am sending by today's mail a sample of yellow pine, quarter-sawed, obtained from El Paso, Texas. This is the flooring specified for the Mess Hall. Oregon fir will not fill the bill.

Very respectfully,

J. S. PERKINS,

Superintendent.

WITNESS.—(Continuing.) So far as I know that is all the correspondence between myself and Mr. Boggs. I never gave any other notice in connection with the cessation of the work, except the one of December 28th, which has been put in evidence.

(Testimony of James S. Perkins.)

Redirect Examination.

(By Mr. HORTON.)

I am a bonded officer of the United States Government at the Rice Station Indian School. I have general supervision over the school and all different departments and have charge of it. There are various departments there. In order to secure results in my work as superintendent of that school I have assistance. Any carpenter work that is being done upon the [132] premises is in charge of the school carpenter. In 1905 and particularly the period involved in this litigation, the school carpenter was William R. Carroll. I was not myself qualified in any way to undertake the work that Mr. Carroll did at the school. The building in question in this case was built on the school grounds, and in the scope of my authority, I had general supervision of the ground and whatever was going on there. I am not a building expert in any sense of the word. I was not sent from Washington with special instructions to give my undivided attention to the building of the so-called Boggs structure during its course of construction. Whatever I did in that particular was incidental to my regular run of duties as superintendent of the school. My superior officer in my work down there is the Commissioner of Indian Affairs, Washington. The Commissioner of Indian Affairs during the year of 1905 was Francis E. Leupp. In the matter of this building I received more letters from the Assistant Commissioner than from him. The Assistant Commissioner was C. F.

(Testimony of James S. Perkins.)

Larrabee—Major Larrabee. I was never authorized to accept any work or any material for the Government down there upon that school without reference of the matter to the Department at Washington. I always take it that the official authority resides there. As to binding the Government of the United States to an acceptance of the work as to the quality of the material and the work furnished and specified in Defendant's Exhibits 1 and 2 for Identification, I have no specific authority from the Commissioner of Indian Affairs to offer in the matter.

Q. Did you have any other kind of authority, Doctor, in connection with the material and labor that was done upon the building there in the course of construction, to finally accept it on behalf of the Government? A. No.

Q. Either written or verbal?

A. No, sir, I would not consider any authority except [133] written authority.

Q. And you had no written authority?

A. No, sir, not to accept that building; I had none.

Q. You had no such authority at the time you executed Defendant's Exhibits 1 and 2 for Identification?

A. No. I never had any authority to accept it.

The COURT.—What was your authority? Can't you explain to us, Doctor? If you can, just what your authority was in reference to that building.

A. I had general supervision over everything on the ground.

(Testimony of James S. Perkins.)

By Mr. HORTON.—Well, I mean does your authority grow out of the fact you were superintendent of the school solely? A. Yes, sir.

Q. You have no authority other than that?

A. No, sir.

Q. From the fact that you had supervision of what was on the ground?

A. That is my position in the matter.

Q. That is your position in the matter?

A. Yes, sir.

WITNESS.—(Continuing.) Neither the Commissioner nor the Acting Commissioner of Indian Affairs ever inspected this work or the materials furnished in person. It was otherwise so inspected by them through Supervisor Charles—John Charles—who represented them. He came on as I have testified, about the first week in September, 1905.

The contract involved in this case was signed on behalf of the Government by Major Larrabee, acting commissioner at the time. It is true Mr. Carroll called my attention to certain so-called defects not to exceed a week prior to the 21st day of [134] July, 1905. Prior to that time Mr. Carroll had said nothing to me about any so-called defects in that work. Mr. Carroll was the school carpenter. Prior to the time that he came to me with a list of so-called defects I had never asked him to give his attention to the matter of the building that was being built by Mr. Boggs. When he came to me he came with a complaint—I couldn't say whether it was a list of defects or not. He came to me and talked to me about

(Testimony of James S. Perkins.)

the different items. It was then that I asked him to assist me in learning just exactly the statuts of the work.

Q. Prior to that time you did not know the exact status? A. No, sir.

Q. Of the work upon which you had been reporting to Washington? A. No, sir.

Q. That is from a technical standpoint?

A. Technical standpoint? I was ignorant of some of the facts in the case.

WITNESS.—(Continuing.) I read the contract, part of it, read *at* the specifications as soon as I received them, I suppose, but at that time I had no familiarity with them. I gave my attention first specifically to acquiring a familiarity with the plans and specifications after Mr. Carroll came to me and talked to me about it, the way the work was going on. I gave my serious attention to it as soon as the matter was first called to my attention that there were being violations of the contract. Prior to that time I had assumed that the contract was being executed in good faith, and did not know anything to the contrary. [135]

The structure in question is a single story building divided in a front and rear portion. In the front was the mess-hall and the children's dining-room—off to one side being the employees' mess-hall and china closet; in the rear portion it was designed for a laundry, bakery, and kitchen. That is to say, mess-hall in front, in the centre kitchen, and in the rear the laundry, and to your right the mess-hall,

(Testimony of James S. Perkins.)

and then in the rear the laundry portion of the structure, bakery and kitchen. There are over two hundred children at the school. Our allowance is 216 allowed by the Department. They are Apache Indians. In the portion of the structure known as the mess-hall only one purlin was placed by the contractor on each side and there should have been two on each side.

Mr. HORTON.—(Showing plans to witness.) I call your attention to that line that is drawn through there, and ask you what that indicates if you know, although it is not marked a purlin?

Ans. I think you had better refer that to the technical expert.

Q. Well, don't you know as a matter of fact that that indicates a purlin at the bottom, and specifically detailed upon this other blue-print as a part of the same exhibit and marked just above the wall-plate?

Ans. No, sir, I couldn't say that I know.

Q. I see.

Ans. I am not a technical expert.

WITNESS.—(Continuing.) My understanding was when I made my report was that the plans called for two purlins each side, one at the top and one at the bottom. The plan before me indicates on one side of the roof of the mess-hall a purlin near the top indicated by the word [136] purlin at the line. The word purlin is written right there. Perhaps that refers to the purlin running near the hip of the roof. It appears that way. I don't know what this other line indicates that my attention is called to just below

(Testimony of James S. Perkins.)

that line not marked. I think you had better get one of the experts to explain that for you. When I testified yesterday that those plans such as were shown me called for two purlins, I was not sure of that particular matter, and testified accordingly. I would prefer for an expert to testify to that. In pulling off the wainscoting about which I have testified, I pulled about as hard as I could pull with my fingers. I pulled off a few feet. There was some molding I pulled off the top of the wainscoting. The molding was perhaps three-quarters of an inch thick. That was molding that had been put on as an ornament on top of the wainscoting two inches or such a matter. The wainscoting was easily pulled off. It was loose and I loosened up some of the wainscoting all right. This molding tended to hold the wainscoting in place, and when the molding was removed, the wainscoting could be got off much more easily of course, if the molding on top was taken off. I don't remember about how many flues there were in the fireplace in the employees' mess-hall. I had a talk with Mr. Mulford, I know, about the fireplace, and it appeared to take up a good deal of room, and that room for the employees' dining-room—the room was rather small and I wanted the fireplace left out, and if I remember right, substituted a stove for the fireplace, and I got authority from the Commissioner of Indian Affairs to make the change. That is to make the change of the fireplace. I think I wrote to Washington about that. I don't remember whether my authority to make the change in the way of omit-

(Testimony of James S. Perkins.)

ting the fireplace included an omission of one flue from that chimney. That matter was called to the attention of Mr. Charles in the matter of making his investigation. [137]

When I testified upon cross-examination that the omission of the fireplace might have accounted for the omission of one of the flues in that chimney, that too, was a mere conjecture on my part, and whether or not it did account for the omission of one flue I do not know. At the time the United States ordered a cessation of the work that the defendant Boggs attempted to do by way of reconstruction of the building after the fire, at that time the Government took possession of certain materials that belonged to defendant Boggs. I was thereafter directed by the Commissioner of Indian Affairs to appoint a commission to invoice the property, and I did so. The property that I took into my possession was stone and lumber, shingles and some hardware, and—the commission made a list of it, invoiced it and I sent the result of their investigation to the Commissioner of Indian Affairs at Washington. Perhaps I sent a list in to the Commissioner at Washington.

Mr. BOWEN.—(Addressing the Court.) I understood yesterday that the Court gave me permission to file an amendment.

The COURT.—If it is necessary and if you desire you can put in a special pleading. This is a suit for damages. I am inclined to think that anything that would reduce the damages growing out of the same transaction is a matter of litigation, that you can

(Testimony of James S. Perkins.)

recover in this court without pleading.

Mr. HORTON.—I desire to state that it was my impression that the record did not show that counsel had been granted permission to amend, and also failed to show objection on the part of the Government to such a proceeding. I desire that the records so state. In talking the matter over with Mr. Bowen during the recess there was some dispute as to the record. If *you* Honor takes that position I desire that the record now show, in view of your Honor's statement at this time, that we object to the amendment such as is proposed by counsel. [138]

The COURT.—I will permit you to amend, Mr. Bowen, over the objection of the Government. I think it will be a surer way of presenting the matter to file an amendment, as there may be a question about the other practice.

WITNESS.—(Continuing.) Having refreshed my recollection as to the material I seized in the name of the Government on or about the 28th of December, 1905, by looking at the copy of the letter from myself to the commissioner at Washington on January 2, 1906, the items comprising the material seized by me are, Mr. Hopper's tool-chest, two boxes of hardware, twelve kegs of nails, eight truss rods and washers, twenty-six rolls of building paper, all stone about the building, ten yards of sand, three carloads of lumber and shingles.

Recross-examination.

(By Mr. BOWEN.)

All the letters that have been introduced in evi-

(Testimony of James S. Perkins.)

dence here I was authorized to write. The statements contained in those letters were statements authorized on my part. I had correspondence with the Department at Washington from time to time during the whole of this construction. In the correspondence between myself and the Department, I reported the progress of the building from time to time, and I had replies from the Department to those letters. Those replies recognized by official duties in that respect, and confirmed my acts of supervision. I received from the Department, I think, with the contract, forms for making out the certificates which are on file here as Defendant's Exhibits 1 and 2 for Identification. There were no written direction with them. They were just mailed to me. Defendant's Exhibits 1 and 2 for Identification were received by the Department from me and have been in possession of the Department ever since. When I signed those papers—those exhibits—I delivered one to the [139] contractor and forwarded one to the Department to the Commissioner, and the one I forwarded is the one that has been produced here.

I did not examine the building in detail until after my attention was called to the defects by Mr. Carroll. That was shortly before I made that request. A few days before the 21st of July. It might have been as much as a week before. It might have been a week or a little less. I can't remember exactly. As to whether it was probably less than a week before the 21st of July I would say along about that time. The signature to the paper now handed

168 *The United States Fidelity etc. Co.*

me dated July 8th, 1905, is my signature. I sent that paper to Mr. Boggs.

(Document offered, read and introduced in evidence as Defendant's Exhibit No. 8.)

Defendant's Exhibit No. 8.

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, July 8th, 1905.

A. W. Boggs,

Riverside, California.

Sir:

For your information and future benefit I submit an itemized list of discrepancies in the building now under construction by you at this place, viz.:

- (1) Specifications call for 6x8 purlins,—you have put in 4x8.
- (2) Specifications call for 2x10 hip and valley rafters;—you have put in 2x8.
- (3) Specifications call for ceiling, $\frac{5}{8}$ ", and wainscoting $\frac{7}{8}$ ";—you have sent $\frac{3}{8}$ " and $\frac{1}{2}$ ".

[140]

- (4) Specifications call for wall-plates, 4x12 and 2x12, with anchor bolts;—you have made the wall-plates mostly 2x-6 and no anchor bolts.
- (5) Specifications call for 1- $\frac{1}{8}$ " stuff for stoop floors; you have put down $\frac{7}{8}$ " stuff.
- (6) The window sash sent are all unmortised sash. Chimneys, plastering and hearths will prob-

(Testimony of James S. Perkins.)

ably be the subject of another communication from me.

Very respectfully,

J. S. PERKINS,

Superintendent.

(Question by Mr. BOWEN.)

The defects mentioned in that letter had been discovered by you some time prior to July 8th?

Ans. Yes, sir.

Q. And do you know how long prior to that time?

Ans. No, I can't fix the date. It was along that time somewhere.

Q. Do you remember now the incident?

Ans. I remember writing that letter.

Q. Do you remember making an examination of the building which resulted in that letter?

Ans. Yes, sir.

Q. Was that your own motion or was it made at Mr. Carroll's suggestion?

Ans. That was made at Mr. Carroll's suggestion. He called my attention to all those defects.

Q. He had called your attention to all those defects prior to July 8th?

Ans. That is probably the fact; yes, sir. [141]

Q. Are you able to say how long prior to that time?

Ans. No, I would not like to say how long.

Q. It may have been as early as the first of the month?

Ans. Well, it might have been earlier or it might have been later.

(Testimony of James S. Perkins.)

Q. In June, so far as your recollection now serves you?

Ans. Well, I can't say. I don't remember, Mr. Bowen, just when he did call my attention to those.

Q. You would not be prepared to say now that it was not in June, would you?

Ans. I would not be willing to swear just when it was. I might be mistaken about the date.

Q. When you said it was as late as a few days before the 21st you were mistaken in that?

Ans. Yes, sir, I evidently was.

Q. So far as your recollection serves you now it might have been prior to June 30th?

Ans. It might have been prior to that or it might have been after that.

Q. When did you communicate the substance of this letter, if you ever did, to the Department at Washington, Doctor?

Ans. I looked up one letter with Mr. Horton: it was dated July 21st—I think that was the date of it, but I don't remember whether that was the first communication with the Department or not.

Q. Do you remember whether you wrote the Government about the 8th of July in respect to the matter set forth in this letter?

Ans. No, sir, I don't remember.

Q. You don't know?

Ans. I don't remember. [142]

Q. The only letter you have any knowledge of now is the letter dated July 21st?

Ans. I refreshed my memory because Mr. Horton

(Testimony of James S. Perkins.)
showed it to me.

Q. You are aware that the payment came forward from Washington to Mr. Boggs on or about the 21st of July?

Ans. No, I don't know when Mr. Boggs was paid.

Q. Are you familiar with the signature of that letter, Dr. Perkins?

Ans. Yes, sir.

Mr. BOWEN.—Will this be admitted without further identification?

Mr. HORTON.—Yes, sir.

(Document referred to offered, read and introduced in evidence as Defendant's Exhibit No. 9.)

Defendant's Exhibit No. 9.

TREASURY DEPARTMENT,

OFFICE OF THE AUDITOR FOR THE INTERIOR DEPARTMENT.

Settlement No. 60602.

Washington, D. C., July 21, 1905.

Augustus W. Boggs,

Riverside, California.

Sir:

Your claim for \$3,539.16, arising in the Indian Service has been settled this day in this office, and allowed in the amount claimed.

A warrant will be issued in payment thereof in due course of business, and when issued the Treau-

(Testimony of James S. Perkins.)

sary of the United States will mail it to your address.

Respectfully,

ROBERT S. PERSON,

Auditor for the Interior Department.

By Y. A. DUNKAM,

Deputy Auditor, F. [143]

(Question by Mr. BOWEN.)

You are not now aware that you advised the Department between the 30th of June and the 21st of July of any defect?

Ans. Not from memory—no, sir.

Q. Have you any documents in your possession that would enlighten us upon that subject?

Ans. No, sir, I haven't anything on that subject.

Mr. HORTON.—Referring to Defendants' Exhibit 8 being letter dated July 8th, 1905, wherein you set forth a list of the discrepancies forwarded to A. W. Boggs, the defendant in this case, I will ask you to state your first recollection as to whether or not it was before or after the 30th of June, 1905, that the discrepancies therein mentioned were called to your attention by Mr. Carroll.

Ans. I don't remember, Mr. Horton. I would not like to swear to that. [144]

Testimony of J. C. Kincaid [for Plaintiff].

J. C. KINCAID, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HORTON.)

I am a carpenter by trade. I commenced my trade

(Testimony of J. C. Kincaid.)

the first day of March, thirty years ago, and most of the last thirty years I have been engaged in work as a carpenter.

Mr. BOWEN.—We will admit the qualifications of the witness.

WITNESS.—(Continuing.) I met the defendant Boggs on the last day of May, 1905, at Riverside, California, and was employed by him to go to Rice Station Indian School and take charge of the carpenter work in the building being constructed there by Mr. Boggs. I left on June 1st, 1905, and arrived on June 2d at Rice Station. Mr. Boggs gave me some drawings at the time of my employment and the rest of the drawings were at Rice. I was to do the woodwork in particular on the building. On arriving there I found that the walls on the outside were very high built. They were stone walls. I commenced work on the woodwork on the 3d of June, and I got through on the 16th if I am not mistaken. I started home on the 17th and got back to Riverside on the 18th of August. During that time I represented Mr. Boggs down there as foreman in the wood work. I built trusses as Mr. Boggs' foreman. The only place there was a truss was over the mess-hall of the building. My attention being called to the detail at the heel over the mess-hall, so called, in one of the blue-prints in United States Exhibit "A," I did not work on that sheet. I built the trusses according to detail made by Mr. Boggs, and the lumber upon which I had to work from. The detail drawing Mr. Boggs gave to me in River-

(Testimony of J. C. Kincaid.)

side at the time I was employed was not the same as the plans [145] and specifications in that particular. The particular drawing Mr. Boggs gave me is now destroyed.

To the best of my memory the reason for the change in the construction was the plans showed one wall to be one foot higher than the other; that is, the walls of one part of the building showed a foot higher than the other, according to United States Exhibit "A," plans and specifications, and the one that he had made would fit around and come around level and leave both walls the same height. During that conversation I called his attention to the fact that the drawings he furnished me were different from the blue-prints in United States Exhibit "A," and he said that they should go on this one. If I remember right, he said that the drawings were made by a set of kids at the office of the Supervising Architect. And he didn't think that the Supervising Architect had ever looked them over carefully; if he had, that they would have been constructed to come around level the same as that little drawing as Mr. Boggs gave me. He said that the plans had been made by a set of damn kids. When I called his attention to the difference in the drawings that he gave me, and the blue-prints that were furnished, he said they were gotten up or made, I don't know which, by a set of damn kids. He said he didn't think the Supervising Architect ever looked them over. In the structure I built at the Rice Station School I used purlins in the mess-hall. One purlin

(Testimony of J. C. Kincaid.)

on each side. In regard to the truss I did not follow the blue-prints in United States Exhibit "A": I used the detail that Mr. Boggs gave me. I didn't follow the plans known as United States Exhibit "A" in this case. Whatever work I did down there was done under Mr. Boggs and Mr. Mulford. Mr. Mulford, I had to go by his say for some things as he was on the ground and was superintending his part of it, which was the mason work, when I got there. His part was the mason work, stone work and plastering. At the time of my [146] employment I did not have any conversation with the defendant Boggs, with reference to the material I should use, only he said I would find the material on the ground and gave me in some instances if I ain't mistaken, the size that he had. For instance, you take the truss, the timbers on this truss were not the same as shown in the blue-print, but the same as the drawing that he gave me to use. As to being compelled to use whatever material I found down there, I would naturally have to follow the man's instructions under which I was working. As most all contractors would say, he wanted me to get along as saving as I could. He might have said do the best you can with what you find down there. I don't know as I can put it in his exact language. That is a lapse of practically five years and you would not be supposed ever to be called upon again. It would be pretty hard to use the exact language.

It was not possible to do the woodwork specified in the plans and specifications known as United

(Testimony of J. C. Kincaid.)

States Exhibit "A" with the material I found upon the ground when I arrived at Rice Station Indian School. I know Dr. J. S. Perkins who has testified. I don't know as there was a day but what I would see the Doctor around there going to and fro about his business. He did make objections as to alleged defects appearing in the course of the construction of the woodwork as I was putting it in. Those objections were about as he has stated in the questions that were asked the Doctor when he was on the stand. I don't remember that the Doctor made reference as to making any changes, only he wanted what the specifications called for, and the material I had at hand it was impossible for me to have made—or fulfilled the demands of the Doctor or the contractor if I had wanted to. As near as I can remember when the Doctor spoke to me about it and says "Kincaid, don't put those on." "Well," I says, "Doctor, I [147] will have to put it on regardless of any protest of you or any other inspector unless"—if I remember right, "I was served with papers to stop and my instruction was to keep driving nails."

Just before I got through and came away after the Doctor had make a good many objections; then I received a communication from Mr. Boggs at that time to do everything possible to satisfy Dr. Perkins, referring to the work that was done. It is pretty hard if you have a piece of work in and it is not satisfactory, for to make it that way unless it was taken out and put in as called for, which I hadn't any instructions to do. I received some com-

(Testimony of J. C. Kincaid.)

munications from Mr. Boggs while I was there. I believe that Mr. Boggs said that he had gotten a letter from Dr. Perkins finding fault—well, it would be the same as finding fault you might say—with the whole entire structure. As I stated before, that his instructions then to me at that time was to do everything that I could to please the Doctor, and that is the only letter I ever received from Mr. Boggs with regard to anything in that line as I remember it. The letter I have in my hand I received from Mr. Boggs.

(Letter offered, read and introduced in evidence as United States Exhibit "X.")

United States Exhibit "X."

Riverside, Cal., 8/14, 1905.

Mr. T. C. Kincaid,

Dear Sir:

I received a letter from Dr. Perkins with a long list of complaints rejecting nearly the entire building and I am certainly up against it hard if he carries out his intention. The list is as follows—sash *to* heavy for weights, sash no [148] good Box frames not box frames. One wall bulging out of line 3/16 of an inch rafters not braced over rear building. Chimneys falling to pieces. Plain glass not cold storage, &c.—Now I ordered hammered glass to these windows and if they have sent any others 'twas not my fault—kindly send on the size and I'll send same out. Also what size washers shall I send to make windows work all right and how many—I sent you checks last week

(Testimony of J. C. Kincaid.)

for time as I have no way of sending cash and if you have money enough to pay your way back do so and I'll refund same— Tell Hopper and Rolland the owner I enclose check covering am't enough to bring you home if you can get it cashed—go over the roof and brace everything also brace valley rafters and do all you possibly can—kindly examine the plasters and tell me their objections to same—also have the space outside all chimneys plastered he says no plastering on same and building is liable to burn down. Please look after this—and be sure & send me size of hammered glass for cold storage and am't of washers for weights—do not keep anybody on the pay list unless absolutely necessary—as I am up against it hard—find out from Smith the am't of board bill of yourself, Rolland and Hopper and I'll send him a check—have I any nails there? If so stack them and ail of Mulford's tools—

Insted of sending check I'll send \$133.00 to San Carlos by Wells Fargo to pay your way Rollands & Stone & Hopper back—you will have to send then for same let me hear from you at once and how bad the situation is—

Yours,

A. W. BOGGS.

Present receipt to get money.

BOGGS [149]

WITNESS.—(Continuing.) There was no wall-plate placed upon the walls when I got there. There were no stay bolts whatever. As to the foot bolts indicated on the blue-prints, we used one in the foot of each truss—that would be two in each truss—one

(Testimony of J. C. Kincaid.)

at each end. I observe the plans and specifications call for two at the foot of each end. I wasn't working on those drawings in that case.

Cross-examination.

(By Mr. BOWEN.)

When I got there on the second of June, the outside walls were mostly up. I believe, if I am not mistaken, there was part of the joists in the main mess-hall were in. In regard to the woodwork, that was all the woodwork that was done. As to the rest of the construction I didn't pay much attention to because I hadn't anything particularly to do with that. It was under the direction and supervision of Mr. Mulford. During the month of June the first thing I think I put in was some joists, and Mr. Mulford was not quite through with the wall, and we couldn't put the roof on until the wall was done. Pretty much all of the plastering might have been put on in June. I think I put most of the joists in in June. I don't remember about the roof being completed by the first of July. It seems to me like that it was later than that. It might have been by that time. To the best of my recollection the joists was all in by the last of June. I can't say in regard to the fireplaces and chimneys whether they were in at that time or not. The floors didn't go in until after the plastering was done. I don't remember as to whether the plastering was done and the floors put down or partly so at least by the last of June. I would not want to say because I might be mistaken in it. I would judge if they were plastering that the

(Testimony of J. C. Kincaid.)

partition walls were all up by the last of June. The joists were exposed to view until you put the floor [150] on, and then they would not be. I can't say as to whether the floor was on in the month of June or not—it might have been and it might not. The joists were not exposed to view before June because I went there—they were exposed to view until covered up by the floor, and that was either during June or later.

As to the trusses and rafters I don't know whether they were exposed to view during that month or not. They were exposed to view until the ceiling was on. Whether I got them on in that time or not I would not be able to say. I judge they were put in during the month of June. They were put in within a month of the time I got there. I would not want to swear the trusses and rafters were in about the end of June or I would not say they were not. After this time has elapsed it is hard to tell and I can't tell whether the trusses was up at that time but I presume they were. I presume they were up by that time. That would be my best judgment. The truss was up by, we will say, July 1st. I presume the purlins were in at that time, yes, sir. If the roof was on, yes, they were undoubtedly on by that time.

As to the shingles, they were put on some time from the commencement until the finish of my part of the work. I would judge from Defendants' Exhibit No. 2 for Identification, that they must have been on before the first of July. Either myself or some of the men working for me put in the ventil-

(Testimony of J. C. Kincaid.)

ators in the ceiling of the mess-hall and other places. I believe, if I remember right, Mr. Rollin and Mr. Hopper done that—put the ventilators in. The ventilators and the shingles and the floor joists and the trusses, roof sheeting, ceiling joists from the start until they were covered up, anybody that went through that was looking for anything could see them. I noticed Dr. Perkins about the job a good deal of the time. He might have been there every day or there might have been a day or so when he was not there. I was there every day from the time I started until I [151] got through. When I got there on the 2d of June, there was not very much lumber in place, I think there was part as I said before, part of the joists in the main mess-hall. That is all I remember. In putting in the joists it would be natural to put in the girders. There is two girders in there if I ain't mistaken to support the joists. Of course if there was any joists in they would have to be put in to support them or the joists couldn't be in. I think that probably the floor joists, ceiling joists, and the trusses and the rafters and the purlins had all been put in some time prior to the 30th of June, 1905. It might have been past that length of time but I think that they were in by that time.

As to whether at some stage in the construction of those things they were not covered up by anything and were visible as to anybody that should happen by, I would say that in the construction of all buildings there is some time in the construction that you can see each and every piece that goes into the build-

(Testimony of J. C. Kincaid.)

ing of course. When I had my conversation with Mr. Boggs at Riverside before going down there, I believe he mentioned something in regard to the plans that had been submitted to him by the Government being for an adobe building and not for a stone building. I saw the plans furnished by the Government for the adobe building while I was down there—the stone mason was working from them. A truss and a purlin is not the same thing but they are both parts of a roof. The wall-plates that I made were put on top of the wall where they would naturally come. They were not laid down in or fastened on by any angle bolts. They were spiked down on the stone, the stone being volcanic ash. It was simply set down on top. That is not a proper method of construction for stone work. I done it according to the way I was instructed. Wall-plates that go on that way should be bedded and [152] anchored down upon any mason work whatever. They were anchored down with spike nails. That didn't make a very good anchor. If you were going by the details of this plan which I have in my hand, this shows here that you have got two by twelve, two two by twelve, making four by twelve in the center of the wall and with the bolt running between them here which calls for two feet nine inches long. It is correct that this calls for an adobe building. It says "Adobe Building." It might not be absolutely necessary to put a two foot nine inch bolt as that drawing calls for in solid masonry, but it would be better if it were in. I would rather have it in than

(Testimony of J. C. Kincaid.)

not. Under the way that that truss is constructed as shown here in these plans it would be much better because carrying down the line of your truss here the weight comes over the center, but take that line right on down there, you come out pretty near at the outside of your plate. I did not build that truss work in that way. I built the truss—hooked the rafters onto the wall-plate. According to the drawings they gave me that made it necessary to have wall-plates at each side of the wall. I would not like to set the date when the Doctor objected to the work, and the manner in which it was going up. It might have been prior to the 30th of June or it might have been afterwards. From the testimony I have heard here it was presumably a month or something like that after I had started that Dr. Perkins began to object about it. It might have been a little later. The first time that he called my attention was when he came down and was objecting to the manner and the material which was going in, but the exact date of it I don't know. That was the material in general. There was some of it that was not in the building and some of it was. At the time he objected to the kind of material that was being used I think I was putting on the wainscot. It was going on. I believe the only time that he and I had a controversy in regard to that I was working at the bench [153] when the Doctor came to me about it. I can't fix the date of that. It was some time along about the time that those communications passed here that he objected, I don't think the wain-

(Testimony of J. C. Kincaid.)

coting was done or commenced at least prior to the 30th of June, not the wainscot. The wainscot would naturally come on the inside finish. You would naturally get the rest of the building done and the plastering on before you got to the wainscot. He made objections to me at the time, and stated to me that he wanted the work done in conformity with the plans, something to that effect, yes, I suppose he specified the objections at the time. I presume that he did. I notified Mr. Boggs of those objections as soon as he made them to me.

That letter I received from Mr. Boggs—the letter just read—was written from Riverside on August 16th (referring to United States Exhibit “X”) and I received it, if I mistake not, after I got back from Rice, Arizona. I did not get any other letter from Mr. Boggs on this subject. This letter that I produce here was the only letter I got calling my attention to the communication between him and Dr. Perkins. I left Rice Station on the 16th of August. I had quit and went home, presumably done. There was nothing more that I could do there. The whole building was then finished and subject to the inspection of the Commissioner. The building was finished subject to that inspection. I believe Mr. Hopper left with me at that time, or about that time. Everybody quit about that time. I think it was the 17th, if I am not mistaken; I may be mistaken one day one way or the other, but I think it was the 16th.

This letter of August 14th was not in reply to the first notice I had given Mr. Boggs of Dr. Perkins’

(Testimony of J. C. Kincaid.)

objections. I had written to Mr. Boggs previously about it. The first letter I wrote was as soon as Dr. Perkins commenced to object. I communicated with Mr. Boggs. I could not be certain or anyways nigh [154] it with reference to the time. I have destroyed the whole correspondence and just accidentally happened to have this one letter. It was an accident that I happen to have this one.

As to the trouble with the material on the ground when I got there, all that I can tell they didn't quite come up to size. I knew that when I was putting them in. Mr. Boggs had given me a bill of material I was to use. I didn't notify Mr. Boggs about that. He made the material bill of it himself. Most of the material was on hand at the time I got there. Some of it came afterward. I think there was some material came up just a few days before we quit. I believe some was gotten from Globe and some from Stafford. Some of this material which I found there and which I considered to be insufficient, might have been used in the month of June in joists and truss work and rafter work and some used later. It was lying in a pile like any builder has their lumber stacked up. Anybody familiar with lumber could tell by looking at that lumber that it was not up to the plans and specifications, if they were familiar with it—looking it over they could tell there was a difference in it. I don't know to my knowledge that Dr. Perkins complained to me about that lumber or the insufficient size of it before I began to put it into the building. I don't remember if he did.

Testimony of John Charles [for Plaintiff].

JOHN CHARLES, a witness called on behalf of plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HORTON.)

My name is John Charles. I am 57 years old. I live in Denver, Colorado. I am employed by the Interior Department as Supervisor of Construction. I have been so employed continuously since the 1st day of August, 1901, by the Department of the Interior—that is, by the Indian Bureau under the Secretary of [155] the Interior. My duties are various. I visit all of the schools. I am subject to assignment to any and all of the schools on reservations in the Indian Department for the Inspection of Buildings, and report on the condition of the plants and look up the requirements for necessary improvements.

Mr. BOWEN.—We admit the qualifications of the witness, for carrying on this work of inspection.

WITNESS.—(Continuing.) Since 1901, in the course of my employment, I have been subject to assignment by the Commissioner of Indian Affairs in Washington. I was so employed in 1905. In that year I was assigned to do inspection work at Rice Station Indian School, Arizona, by the Commissioner of Indian Affairs, Mr. Leupp, or the assistant, Mr. Larrabee—I am not sure which. I proceeded to Rice Station and made an inspection of the new building that had just been constructed there. In connection with my work of inspection I used a set of blue-prints of plans and specifications that were on file at the

(Testimony of John Charles.)

office of the superintendent. United States Exhibit "A" is a copy of the plans and specifications, that were used by me.

I reached Rice Station on the evening of September 1st, and commenced the inspection on the morning of the 2d. I made my report on the 7th and made the inspection between the 2d and the 7th. Dr. J. S. Perkins was present at the time I made the inspection. In addition to the plans and specifications marked United States Exhibit "A," or copies thereof, I had before me, in making my inspection, a memorandum of so-called discrepancies in the building that was handed me by Dr. Perkins. I thoroughly inspected the building, and made a memorandum of the facts as I found them upon the work at that time and place.

Refreshing my recollection from a memorandum I now hold [156] made at the time, I would say that the list of discrepancies was substantiated in the main I believe in almost every particular, but I made a report in which I took up each item separately and replied to it or explained the defects that I actually found, regardless of what was stated in the list. I think I made that report September 7th, 1905. I have in my hand a list of discrepancies handed me by Dr. Perkins. My report correctly indicates the facts as I found them.

Q. (By Mr. HORTON.) I ask you to give the facts as you found them upon the ground.

Ans. Do you wish me to read the entire report?

Q. You may make such reference to it as may be

(Testimony of John Charles.)

necessary to refresh your recollection. There will be no objection to his reading it, I suppose, because it is technical?

Mr. BOWEN.—No objection.

The COURT.—He has already testified that that was correct and truly represents the facts as he found them.

WITNESS.—Yes.

(Witness reads list of discrepancies and report above referred to.)

WITNESS.—(Continuing.) I am not able to state positively with reference to Exhibit "V," just where that came from in that building. I am not prepared to say whether that is the particular wood, but we found different strips. Some were removed and taken care of by Dr. Perkins. I don't know what particular walls. I am ready to state that similar pieces were removed from the joints and handed to Dr. Perkins. The cross-section through mess-hall shown in United States Exhibit "A" is made to show the general elevation of the building by cutting through, just the same as cutting through this building showing the construction from the [157] foot to the top of the roof. This (indicating the cross-section) forms the truss—this part here—and these are the purlins which carry the rafters. These are the rafters, and they are intended to bring the load of the roof onto each truss which is carried on to the centre of the wall so it brings all of the load of the roof on the centre of the wall. That shows two purlins on either side of the truss.

(Testimony of John Charles.)

This (referring to the line upon which the purlins rest) indicates the principal rafters. These lines running at right angles to this top principal, indicate an inch iron rod that ties the cross-tie to the head of the truss. When I arrived upon the ground, I found that this class of truss was not constructed at all. The truss was built of lighter material and it was dropped down so that the rafter rested on the wall—instead of on the purlin. There was no purlin here at all. The upper purlin was made of 4x8 instead of 6x8, dropped down 3 feet 6 inches, as I remember it. No purlin there at all, but the rafter is dropped down on the narrow wall—on the side of the wall, so the load of the roof is on the outside edge of the wall instead of in the center of the wall, as designed.

This (indicating) is a more detailed drawing of the so-called truss which shows the foot of the truss, referring to the detail at the heel of the truss over the mess-hall. That shows where the load is brought. The load is brought onto this timber at the centre of the wall. All this load is carried on those trusses which are supported by the centre of the wall. No load on the inside or the outside of the wall. I couldn't find any of the wall bolts in the wall. I did not find this wooden wall-plate imbedded as called for in the plan. There were small, irregular pieces placed on the outside edge of the wall. That is, the wall-plate that I found was spiked down only with nails instead of bolts. [158]

I made an examination to determine whether or not

(Testimony of John Charles.)

the bonds called for in the plans and specifications were to be found in the walls, as between the outer walls and the so-called partition walls. I made an examination at different points of the building, and found there were very few bond stone carried into the wall. It had the appearance—indicated that the outer walls were constructed first and the outer walls built against them without bonds. All stone wall is supposed to be bonded together as built, that is, by lapping one stone from the partition wall into the main wall to tie them together, and the next stone from the main wall comes onto it and it is bonded together in that way. I found one chimney without any bonds that I could discover by examining it from above and below. I looked from the fireplace up and found that one chimney was without any bond between the floor and the ceiling, the entire height of the story. Another of them I found one bond running into the wall. I made an examination of the plaster that I found upon the building.

Looking at United States Exhibit "L," I would say at the time I examined it that the plaster had not reached the degree of dryness evidenced by said exhibit; but it evidently had an insufficient quantity of lime or cement in it to make a good, strong wall plaster. The plaster I found there did not comply with the plans and specifications.

Cross-examination.

(By Mr. BOWEN.)

Q. Mr. Charles, what in your opinion was the

(Testimony of John Charles.)

most substantial of these discrepancies?

Ans. I think the manner in which the roof was constructed and the height of the walls.

Q. Was that a matter easily discernible by anybody during construction?

Ans. Not necessarily, unless they were directly competent to understand the intention of the details of construction. [159]

Q. I am assuming that a person was competent to understand something about construction. If you had been there and seen the roof being constructed, you would not have approved it, would you?

Ans. No, sir; I would not have accepted it.

Q. It would not have satisfied you?

Ans. No, sir.

Q. And the same applies to the height of the building? Ans. Yes, sir.

Q. And the plastering? Ans. Yes, sir.

Q. And the chimneys? Ans. Yes, sir.

Q. And the woodwork? Ans. Yes, sir.

Q. None of that would have been approved by you if you had seen it while it was being constructed?

Ans. No, sir.

WITNESS.—(Continuing.) All the discrepancies that I have mentioned in my report were found in the building. Some are more important than others. Some of them, if they stood alone, do not amount to much. That discrepancy about the hearths—about the strip around the hearths—I do not consider that important. I mentioned as a discrepancy the fact that the hearth is of cement instead of brick. It is

(Testimony of John Charles.)

true that change was made by direction of Dr. Perkins, and if the cement had been good it would have been equally as good as brick, but it was not a good quality of cement. The surface of the cement presented a fair appearance, yes, sir; but the inside was of poor quality. I would not have had that if I had been there at the time. I said the concrete under the surface, [160] where visible, had broken edges and is thin and poor quality. That would not have been acceptable.

The objection raised to the centering of the joists I did not consider very important. The placing of the joists I did not consider that a very important objection, although it was not strictly in accordance with what is shown on the plans. They were not spread beyond a reasonable distance. I consider a variance of an eighth of an inch in the thickness of lumber very material. It is a fact that in ordering $\frac{3}{8}$ ths and $\frac{5}{8}$ ths lumber when you specify that thickness, that is subject to the surface dressing of the lumber. There are stipulated rules regarding that. When you order from the mill $\frac{3}{8}$ th lumber, when you get it surfaced one side it will be $\frac{9}{16}$ ths after finish. $\frac{5}{8}$ th is $\frac{9}{16}$ ths after being milled and dressed. $\frac{7}{8}$ ths is made from one inch stuff, and is $\frac{7}{8}$ ths when completed.

A recent ruling of the lumber association is that what is usually called $\frac{7}{8}$ ths can be reduced to $\frac{13}{16}$ ths, which is $\frac{1}{16}$ th less than $\frac{7}{8}$ ths. That is the standard ruling.

At the time this construction work was going on if

(Testimony of John Charles.)

the *the* contractor, ordered $\frac{7}{8}$ ths material he would get, if it wasn't surfaced, 13/16ths. The smaller mills usually cut their lumber a little heavier than the large mills. The ruling is for the lightest acceptable thickness for standard lumber.

As to whether there is anything else that I regard as trifling, as I said before, the items mentioned if they stood alone, they would not be important, but when you get an accumulation of little things, each one weakens the other. I don't think of anything else now of a trivial character. Well, there is another item I would not consider so very important if it stood alone, and that is those little doors to the basement windows. It was a small matter, not a serious matter to weaken the building. I saw the joists underneath the floors through those windows in the *base*-. The floor I didn't take up was in the corridor. The complaint was that the joist did not rest into the wall as designed, which Dr. Perkins assured me was so. I didn't consider that enough importance to tear it up. Although the danger [161] of that is that these wood supports may rot in time, and make an irregular floor, but I took their word for that.

As to whether that was easily discernible before the floor was put down, I would say they might have all been put down in one day. They may have put the foundation work and the floor all in at one time, and Dr. Perkins may have been there or he may not. I don't know whether he objected to that or not.

(Testimony of John Charles.)

This information about the joists was in the list of discrepancies, furnished me by Dr. Perkins. I don't know who drew that up. It was handed me when I reached there. I presume he received the information from Mr. Carroll. That was my impression. But he assured me that he had seen that, and Mr. Carroll had seen it. Whether they lodged an objection or not, I don't know. Mr. Carroll assured me that he had seen those joists. It was possible to see them only before the floor was put down on top of them. The facts are he may have been acquainted with those facts because he saw there was no provision for the joist to rest on the wall. The proper way was to build the joist in the wall when the wall was being constructed, so that he might have known that fact while the wall was being constructed.

I personally inspected the ceiling joist and the purlins and the rafters. I went into the attic by a ladder. The attic was accessible by ladder. It could easily have been viewed at any time. I got there myself a number of times. Dr. Perkins went with me. Dr. Perkins went up and looked at these things himself. As far as I could tell from the construction there was nothing to hinder his having examined them.

Redirect Examination.

(By Mr. HORTON.)

Q. In your cross-examination you stated as the most important substantial defect, the roof, and the height of the walls. I call your attention to the de-

(Testimony of John Charles.)

fect known as failure to [162] bond the walls. I ask you to state what the relative importance of that defect is compared with the two defects you have specified as substantial.

Ans. That is a very important feature. I didn't give you that because I didn't think of it, but that is a very important thing.

Q. Mr. Bowen called your attention to the most important defects, and you now include the failure to bond the walls, as well as the roof construction and the height of the walls?

Ans. Yes, sir. I might enlarge on that by going into detail, but I think those three items are the most important.

WITNESS.—(Continuing.) In my opinion the building as I found it could not be made to comply and conform with the plans and specifications without being torn down.

It could not in my judgment be made to comply and conform with the plans and specifications known as United States Exhibit "A," without the expenditure of a large sum of money.

Recross-examination.

(By Mr. BOWEN.)

I have never estimated what it would cost to repair the things I have called attention to. The expression "large sum of money" has a fixed or definite meaning to me because I compare the amount I consider necessary with the total amount of work that was done. I have never reduced that to figures, but my familiarity with building would give me a pretty

(Testimony of John Charles.)

good general idea. I think it would cost more than the original building cost to tear that down and rebuild it as it should be built. My idea that it would be necessary to tear the whole building down and built it over again is based on the whole detail work. From a very short distance from the floor all around that building there were openings even running to the floor, door and window [163] openings. There was not one of those that was built according to specifications. It could not be remedied in the stone construction without removing the stone. The frame would have to be taken out and rebuilt and the stone work at the frame would have to be relaid, which would make it necessary to remove the stone down to that level.

The entire stone construction down to the window-sill line would have to be taken down. The stone construction was not built in a workmanlike manner. Various things were the matter with it. In the first place there wasn't a stone that was properly fitted to the frame.

Q. Was the error a glaring and apparent one?

Ans. Very.

Q. You could tell it at a glance, could you?

Ans. Yes, sir.

Q. How much of the building did that cover?

Ans. The entire building.

Q. You found it was that way all over the building?

Ans. Yes, sir.

Q. Nothing to prevent you from seeing that or from anybody seeing it?

Ans. I saw it.

(Testimony of John Charles.)

Q. The error of the bonding of the walls was also apparent, was it not, while the construction of the stone work was going on?

Ans. It would be to me, yes, sir.

Q. Or anybody that had the plans and specifications in his hands?

Ans. Yes, if they understood what the specifications required or the general method of doing work.
[164]

**Testimony of Augustus W. Boggs [for Plaintiff],
Recalled.**

AUGUSTUS W. BOGGS, recalled on behalf of the plaintiff, testified as follows:

Direct Examination.

(By Mr. HORTON.)

On or about the 10th day of June, 1905, after I had begun operations under the contract known in this case as United States Exhibit "A," it is my memory that I received pay from the United States Government in the sum of \$4,356.24 in pursuance of that contract. I could not give the exact date; and I received another payment under the same circumstances in July—about the 21st of July, 1905. The amount was \$3,539.16.

Mr. HORTON.—I now offer, if the Court please, one of the regulations of the Indian Office effected April 1, 1904, published by authority of the Secretary of the Interior in a book which I now have in my hands, being paragraph 488 thereof, which for your Honor's information in passing upon the offer, I shall read.

(Counsel for Government reads regulations last offered as follows:)

United States Exhibit "Y."

"488. Claims for construction of buildings, water and sewer systems, heating and lighting plants, etc., must describe the buildings erected or work performed; give the name of contractor and date of contract, and show in detail the value of material and labor expended to the time payment is claimed. They must be accompanied by the certificates of the agent and superintendent of construction that the work has been carefully inspected and found to be actually in place and of the value represented; that it has been done in a workmanlike manner; that the stipulations of the contract have been fully complied with, and that the amount claimed is actually due, no part thereof having been [165] paid."

Together with the certificate or statement of W. A. Jones, Commissioner of the Office of Indian Affairs in the Department of the Interior dated Washington, March 1st, 1904, and approved by Ethan A. Hitchcock, Secretary of the Interior, reading as follows:

"Department of the Interior,

Office of Indian Affairs,

Washington, March 1, 1904.

The following regulations covering the management of affairs growing out of Indian relations are promulgated for the information and guidance of all concerned, and will supercede those of 1894 on April 1, 1904.

Indian agents and all officers of the Indian De-

partment are enjoined to carefully study the regulations herein set forth and to render a strict compliance therewith in every particular.

Papers or accounts not made out in the prescribed form may be returned to the officer by whom prepared for restatement, while a continued disregard of the regulations laid down on the following pages will render the offender liable to suspension or removal from office.

W. A. JONES,
Commissioner.

Approved:

ETHAN A. HITCHCOCK,
Secretary of the Interior."

Mr. HORTON.—(Continuing.) I offer what I have just read, paragraph 488 of the book I have, together with the statement on the second sheet of the title page. (The same are offered and introduced in evidence as United States Exhibit "Y.")

I now offer, if the Court please, the bond in this case, being the bond of the United States Fidelity & Guaranty Company, which, for identification I will refer to by the No. 26335 appearing upon the face of the bond. The bond is not denied in the pleadings. (Said bond offered and filed in evidence as United States Exhibit "Z.") [166]

United States Exhibit "Z."

BOND.

KNOW ALL MEN BY THESE PRESENTS, that we, AUGUSTUS W. BOGGS of Riverside, County of Riverside and State of California, principal, and THE UNITED STATES FIDELITY & GUAR-

ANTY COMPANY, a corporation, of Baltimore, Maryland, sureties, are held and firmly bound unto the United States of America, in the sum of Six thousand five hundred dollars (\$6500.00), lawful money of the United States for which payment, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors, administrators, and assigns, for and in the whole, jointly and severally, firmly by these presents.

Sealed with our seals, attested by our signatures, at San Francisco, Cal., this 11th day of March in the year of our Lord one thousand nine hundred and five.

THE NATURE OF THIS OBLIGATION IS SUCH, that if the said Augustus W. Boggs, his heirs, executors, administrators, and assigns, or any of them, shall and do in all things well and truly observe, perform, fulfill, accomplish, and keep all and singular the covenants, conditions, and agreements whatsoever, which on the part of the said Augustus W. Boggs, his heirs, executors, administrators, and assigns, are, or ought to be, observed, performed, fulfilled, accomplished, and kept, comprised or mentioned in certain articles of agreement bearing date the 23rd day of February, one thousand nine hundred and five, between the United States of America and the said Augustus Boggs, concerning the furnishing and delivering of the necessary labor and materials to construct and complete a stone mess hall and kitchen, at Rice Station School, Ariz., according to the true intent and meaning of said articles of agreement, then the above obligation to be void; [167] otherwise, to remain in full

force and virtue.

Signed, sealed, and delivered in the presence of—

AUGUSTUS W. BOGGS, [Seal]

THE UNITED STATES FIDELITY &

GUARANTY COMPANY, [Seal]

By JOHN H. ROBERTSON,

Its Attorney in Fact

J. J. KELLOGG,

WILHELMINA KOEHLER,

T. J. THURSTON,

Witnesses to all signatures.

Testimony of Robert A. Smith [for Plaintiff].

ROBERT A. SMITH, a witness called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HORTON.)

My name is Robert A. Smith. I am 36 years old. I am an engineer by trade, and live in Rice, Arizona. I have lived there six years in August. I was at Rice Station, Arizona, or Rice, Arizona, during the year 1905. I am the engineer at the Rice Station Indian School, and was during all of the year 1905. I have been an engineer about fifteen years. My experience extends to any kind of an engine that runs by steam. Dr. Perkins is my superintendent. My duties under Dr. Perkins' superintendence and supervision are to look after the waterworks and the plumbing, cold storage, ice-making, laundry, etc., everything that was run by the power plant. I had certain official duties in connection with the building at Rice Station by Augustus W. Boggs in 1905. The

(Testimony of Robert A. Smith.)

Government requires, I think, a committee to look after such work, and I happened to be on the Committee. It was my duty to assist in watching the building as far as—I received my instructions from Dr. Perkins and no one else. He first requested me to do work of the kind I have mentioned in connection with the building at the starting of the work on the building. Whatever I did I did merely at the request [168] of Dr. Perkins as my superior officer in charge. I don't know what instructions he may have had, if any, from Washington. It was as soon as the work commenced that Dr. Perkins first asked me to look over the building. I should judge the work commenced some time in April, when the workmen first came on the ground and went to the quarry. I know they were in the quarry about forty days before they started work on the building. During the course of the construction of the building there were some chimneys put up. I made an examination of the chimneys, with a view to ascertaining what part of mortar had been used between the stones. I can't recall the date, but I know it was between the time of the starting and finishing of the building of course. I went through the building, of course, and sized up the work.

The plans and specifications called for bonded chimneys in the wall, and they were not bonded. I took my two-foot rule out of my pocket and shoved it through the mortar, and all so that I could see a large opening that I could run my hand in in the space in the flue of the chimney. I made an exam-

(Testimony of Robert A. Smith.)

ination of the bridge work put in under the floor. That was put under after the flooring was down: that is to say, after the joists had been laid upon the girders that were there, the flooring was then laid down and then the bridging was put on afterwards. To do that, they sent men in under the floor. That bridging was nailed at the bottom only with one nail. Nothing was done on the bridging at the top. By the bridging I refer to two pieces of timber between each joist that braced one joist to the other—that cross from one to the other. It was not nailed at all at the top, but was nailed at the bottom, but not at any other place.

Cross-examination.

(By Mr. BOWEN.)

It would not take much trouble to put the nails in at the [169] bottom. It would not have been easy to supply the missing nails because you couldn't get up there to put them in; the floor being down the mechanic could not drive the nails at the top of the bridging next to the floor. The bridging was put in after the floor was down. A man could crawl in under the house easy enough; that is what the man did—he crawled under the house; yes. If he did that he could not put nails in there because he could not drive them. I suppose that was the reason that the nails were not put in at the top, as far as I know. I know they were not put in there because I examined it. Not all the bridge work was already in place when I saw it. There was only one row through the whole—that was run about through the center of the

(Testimony of Robert A. Smith.)

dining-room. The rest of it hadn't been put in at all—it never was put in. I don't recall the date when I examined that.

Q. You have testified about two defects; that is, the absence of nails at the top of the bridge work, and the fact that you could shove your rule about two feet through the piece of plaster?

Ans. I said a two-foot rule through the plaster of the chimney.

Q. Yes, I understand so. Was that the only examination you made?

Ans. No, I went over the whole building.

Q. And is that the result of the examination?

Ans. That is all I have been asked.

Q. Now, did you examine the building prior to the 30th of June, 1905? Ans. Yes, sir.

Q. I show you Defendant's Exhibits 1 and 2 for Identification. That is your signature on each of those? Ans. That is my signature. [170]

Q. That is your signature? Ans. Yes, sir.

Q. Designated "Inspector" on the second one and "Engineer" on the first one?

Ans. Yes, sir.

Q. Were the facts certified by you in those papers true?

Ans. What do you mean by "the facts of those papers"?

Q. (By Mr. BOWEN.) Well, just look at them and tell us whether all of the statements therein contained were true or if any of them were untrue, let us know that.

(Testimony of Robert A. Smith.)

Ans. I don't recall the stipulations of the contract.

Q. Have you looked at both of those papers or only one? Look at both of them and tell us whether there are any statements contained in these papers which are not true.

Ans. This one of May 23d I don't think the material was in the building as specified—that is here, as it would say.

Q. You think that that statement is incorrect then, do you?

Ans. Well, the material was on the ground.

Q. The material was on the ground?

Ans. Yes. And it was my understanding—

Q. Do you mean \$1800 and—

Mr. HORTON.—Well, the witness was about to answer.

COURT.—Yes, go ahead.

Ans. Whether that was already in the building or not I would not say at that time.

Q. (By Mr. BOWEN.) You say in each of these certificates "I certify on honor that I have carefully inspected for the Indian service the work prescribed in the foregoing." That is true?

Ans. Yes, sir. [171]

Q. You were there every day?

Ans. Yes, sir. I was around the building some time during the day.

Q. Every day? Ans. Yes, sir.

Q. And it was part of your duty under Dr. Perkins to inspect that building from day to day,

(Testimony of Robert A. Smith.)

wasn't it? Ans. Not exactly.

Q. Well, you did examine the building—you did every day under Dr. Perkins for the purpose of being able to make a report, didn't you?

Ans. I looked over the building.

Q. For the purpose of being able to sign these certificates?

Ans. That is a matter of form that was furnished by the Indian Department.

Q. Well, just answer the question. You made your examination from day to day so that you would have the information on which you would be able to sign those certificates?

Ans. I signed those certificates.

Q. Now, that does not answer my question.

The COURT.—Repeat the question.

(Last question read by the reporter.)

Ans. Yes, sir.

Q. (By Mr. BOWEN.) And you continued that investigation from day to day up to the 30th of June when you signed the second one, didn't you?

Ans. Yes, sir.

Q. All of that was under the direction of Dr. Perkins? Ans. Yes, sir.

Q. And Dr. Perkins was your superintendent in charge of the construction under whom you acted? That is correct? [172] Ans. Yes, sir.

Q. Now, you say in both of these certificates "I find it" referring to the work that you inspected "to be actually in place and of the value represented: that it has been done in a workmanlike manner, and

(Testimony of Robert A. Smith.)

that the conditions of the contract have so far been fully complied with." Were those statements true? Had the work been done in a workmanlike manner?

Ans. Well, that is not all true.

Q. That is not true? Ans. No, sir.

Q. The work hadn't been done in a workmanlike manner? Ans. I could not recall that.

Q. But you knew that there was some that hadn't been?

Ans. I don't quite understand that document as it is there.

Q. Well, you have just read them, haven't you?

Ans. I didn't know that it was necessary to be in the building. That is, I know that it reads that way, but was it necessary to be in the building?

Q. You understood this thing, didn't you, "that the work had been done in a workmanlike manner"?

Ans. Well, it might be piled up on the ground in a workmanlike manner.

Q. Was there any work actually in place in the building at that time which was not done in a workmanlike manner?

Ans. Well, I couldn't say.

Q. You couldn't say? Then you don't know whether this certificate was true or not?

Ans. I don't recall the work now. I can't see it as I did then.

Q. Do you remember what stage that work had reached by the 30th of June? [173]

(Testimony of Robert A. Smith.)

Ans. I think the stone walls were nearly completed.

Q. And the roof was on, wasn't it?

Ans. I don't know as it was.

Q. Are you able to say whether the joists were in? Ans. No.

Q. And the roof trussed? Ans. No, sir.

Q. You don't know now? Ans. No, sir.

Q. You certify that the stipulations of the contract have so far been fully complied with. Was that statement true or not?

Ans. I don't remember now.

Q. You don't remember now? Then you are not in a position at this time to confirm the statements which you made in those certificates? Is that right?

Ans. That has been five years ago.

Q. You cannot confirm these statements now?

Ans. Not exactly, no.

Q. So far as you know, the statements might be untrue?

Ans. I can't see the building as it stood then.

Q. Have you sufficient confidence in these certificates themselves to say that those statements must have been true or otherwise?

Ans. They were true in a way, but I could not say that they were all true.

Q. You could not say that they were all true?

Ans. No.

Q. Some of them might have been untrue?

Ans. As far as I remember now. [174]

Q. You were aware, in signing these papers, that

(Testimony of Robert A. Smith.)

the Government would make the payments to Mr. Boggs on the faith of these certificates, weren't you?

Ans. Yes, sir.

Redirect Examination.

(By Mr. HORTON.)

I knew Perkins was the superintendent of the school—that is all I knew in the matter. I also understood that the building was being constructed on the school grounds, and that Dr. Perkins had charge of whatever was on the school grounds in the way of general supervision, and whatever instructions I received in the way of doing the work in hand I received from Dr. Perkins as superintendent of the school, and the time came during the course of the construction of that building when Dr. Perkins requested me to assist him in the way of viewing the building. As to when after viewing the building I first saw these documents that bear my signature I would say they must have been signed at that time—that is, when payment was made. I don't recall the date. It was some time after I had viewed the building. I didn't have them with me at the time I viewed the building. I observe that they are in typewriting. I presume the superintendent's clerk did that work.

Sometime after I had viewed the premises or building that was being put up by Mr. Boggs I signed these documents in the superintendent's office. I had instructions from him in that matter before I came in to sign them, that is, when he asked me to look at that—that is to be on the committee for the

(Testimony of Robert A. Smith.)

purpose of helping him. He sent for me to come to the office to sign these particular documents.

As to whether I had any conversation with him there with reference to the matter, I will say that we saw each other several times a day and we talked, of course, over such matters. [175] It was my understanding and I was told so by the superintendent, that the forms were furnished by the Department of the Interior, with the information that they were merely the forms furnished by the Government; I proceeded to sign them without paying any particular attention to the statements therein contained.

By the COURT.—The committee I have referred to was required by the commissioner of Indian Affairs. It is required of the superintendent, so I understand. I got that information from the superintendent under whom I worked. Dr. Perkins, the superintendent, appointed me on this committee. Dr. Perkins and myself composed the committee, and Dr. Perkins put me on it. My information about the matter of signing those papers is derived entirely from Dr. Perkins on that subject. My information as to this committee that I speak of is derived from Dr. Perkins alone.

Testimony of Pember S. Casselman [for Plaintiff].

PEMBER S. CASSELMAN, called on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. HORTON.)

I am in the insurance business and am agent for

(Testimony of Pember S. Casselman.)

the Fireman's Fund Insurance Company. On the 3d of October, 1905, I had a conversation with the defendant Boggs in Riverside regarding insurance on the building in Arizona.

Mr. Boggs asked me to write a policy of insurance for \$8,000.

Mr. BOWEN.—I will object here to the introduction of any evidence relating to insurance on the building.

The COURT.—Objection overruled.

Mr. BOWEN.—Exception. The grounds will be understood, I suppose. [176]

The COURT.—You had better state them.

Mr. BOWEN.—On the ground that the evidence is incompetent, irrelevant and immaterial, not within any of the issues of the case. We reserve an exception to the ruling.

The COURT.—Proceed. I might say, without going into all the reasons for the competency of the testimony, that it is to my mind very clearly competent as showing the interpretation—as indicating, at least, the interpretation Mr. Boggs put upon the contract, as to whether or not the building had been at that time completed according to the terms of the contract. Go on.

WITNESS.—(Continuing.) Mr. Boggs asked me to write a policy of insurance for \$8,000 on a mess-hall and kitchen, if I remember correctly, without referring to the daily report, that he was building for the Government at the Indian Reservation at Talklai,

(Testimony of Pember S. Casselman.)

Arizona. He stated that the building was in process of construction, and asked me to make that endorsement on the policy. He also gave me a diagram of the building in reference to the exposures or to the other buildings that were at the same place. I asked him for that, because it was necessary to have it in connection with the policy, to determine the rate. In that conversation, he did not say anything to me about the building having been previously rejected by the Government.

Testimony of William Sexton [for Plaintiff].

WILLIAM SEXTON, a witness called on behalf of plaintiff, being first duly sworn, testified as follows: [177]

Direct Examination.

(By Mr. HORTON.)

My name is William Sexton. I live in San Francisco, and am in the fire insurance business.

Mr. HORTON.—There is one question I omitted, for the purpose of connecting this evidence of the witness Casselman, that he was agent for the Fireman's Fund Insurance Company, which I suppose is not disputed. If it is disputed—

Mr. BOWEN.—So far from being disputed, Mr. Boggs has himself testified that he received \$6,000 insurance on this property.

The COURT.—Yes, I understood him to so testify.

Mr. HORTON.—Then there is no question *bout* the connection of the evidence?

Mr. BOWEN.—None whatever.

(Testimony of William Sexton.)

WITNESS.—(Continuing.) I am adjuster for the Foremen's Fund Insurance Co., and was working at that business during the latter part of the year 1905. I settled the policy with Mr. Boggs for the fire on the building in the controversy here. At the time of the settlement of the policy with Mr. Boggs, he told me that the building had been rejected by the Government before the insurance policy was issued, but he said that the matter of the repairs was a small matter—not much at all—and could have been repaired—could have been in condition to be accepted. I don't recollect that he said anything other than making it appear to me that the building was worth almost as much as it had cost—worth as much at the time of the fire. Upon that basis I settled with him.

Testimony of James H. Owen [for Plaintiff].

JAMES H. OWEN, a witness called on behalf of the plaintiff, [178] testified as follows:

Direct Examination.

(By Mr. HORTON.)

I am a contractor and builder, and have been in that business for about twenty-five years continuously. I have put up buildings in all the States, pretty near, west of the Great Lakes—public schools and military posts and Indian schools, power plants, churches, etc. During this experience I have been employed by the United States Government to erect several buildings for it. In the buildings I have put up I have had experience in stone construction. It

(Testimony of James H. Owen.)

is hard to answer how many of the buildings I have put up have been of stone construction; there are so many of them that I could not say. I possibly put up stone buildings in probably every State in the West. That is, I would not say in every State, because I cannot recall now; but many of them. In preparing to undertake the work that I have done, I prepare my own bids and do my own figuring upon the plans and specifications as furnished me prior to entering into any contracts. I do all my own estimating; except my son helps me a little, but just lately. In 1907 I built for the Government at Rice Station Indian School, Arizona, a one-story stone building, no basement. The contract was made and is dated January 22d, 1907, between myself and the Government for the construction of said building. (Said contract and the plans, specifications and advertisement attached thereto, offered, introduced and filed in evidence as United States Exhibit "AA.") Said contract, specifications and advertisement are as follows:

[United States Exhibit "AA."]

**CONTRACT BETWEEN THE UNITED STATES
OF AMERICA**

and

JAMES H. OWEN

of 524, Douglas Building,

Los Angeles, California.

WHEREAS, By advertisement duly made and published [179] according to law, proposals were

asked for furnishing and delivering materials to construct a stone mess-hall with plumbing and gasoline gas piping at the Rice Station School, Ariz., said advertisement being dated December 8, 1906, copy of which is hereto attached, and hereby made a part of this contract, and

WHEREAS, The proposal of James H. Owen, aforesaid, furnished in response thereto, was duly accepted on the twenty-second (22d) day of January, 1907, on condition that he execute a contract in accordance with the terms of his bid.

NOW, THEREFORE, THIS AGREEMENT, Made and entered into between C. F. Larrabee, acting Commissioner of Indian Affairs, for and in behalf of the United States of America, of the first part, and James H. Owen, of 524 Douglas Building, Los Angeles, California, of the second part,

WITNESSETH: That the said parties have covenanted and agreed, and by these presents do covenant and agree, to and with each other, as follows:

Article 1. That the said party of the second part, for the consideration hereinafter mentioned, covenants and agrees to furnish all of the labor and materials and do and perform all the work required to construct a Stone Mess Hall, with plumbing and gasoline gas piping, using good local bricks for chimneys, and Washington fir lumber for all inside work, at the Rice Station Indian School, Arizona, in strict and full accordance with the terms of the advertisement referred to in the foregoing preamble, and with the requirements of drawings, plans, and

specifications for said work, copies of which are hereto attached, and all of which advertisement, drawings, plans, and specifications are made a part hereof as fully as if they were embodied herein.

Article 2. It is expressly covenanted and agreed [180] that the said party of the second part shall commence the work herein contracted for within a reasonable time after date of notification of approval of the contract by the Secretary of the Interior and shall complete the same on or before the expiration of 240 days after such notification, and it is further agreed that an extension of this contract beyond the time specified for its completion will neither be asked for by the party of the second part nor granted by the party of the first part.

Article 3. It is further covenanted and agreed that the party of the first part reserves the right at any time to make changes, alterations or omissions from or additions to the work and materials herein provided for, the valuation of such work and materials, if not agreed upon, to be determined on the basis of the contract unit of value of material and work referred to, or, in the absence of such unit of value, on prevailing market rates, which market rates, in the case of dispute, are to be determined by the said Commissioner of Indian Affairs, whose decision with reference thereto shall be binding upon both parties; that no claim of damages on account of such changes or for anticipated profits shall be made or allowed; that the party of the second part shall not be entitled to any additional compensation for labor or material unless he receives written

authority from the Commissioner of Indian Affairs for said changes and the price agreed upon before execution of the work; that no addition to or omission from the work herein specifically provided for shall make void or affect the other provisions or covenants of this contract, but the difference in the cost thereby occasioned, if any there may be, shall be added to or deducted from the amount otherwise due under this contract; and that in the absence of any express written agreement or provision to the contrary, no addition to or omission from the work herein specifically provided for shall be construed to extend the time fixed [181] herein for the final completion of the work.

Article 4. It is further covenanted and agreed by and between the parties hereto that if the said party of the second part shall fail to complete the work herein contracted for, or any part thereof, in accordance with this agreement within the time herein provided for, or shall fail to prosecute said work with such diligence as in the judgment of the party of the first part will insure the completion of the said work within the time hereinbefore provided for, the said party of the first part may withhold all payments for work in place until final completion and acceptance of same, and is authorized and empowered, after eight days' due notice thereof, in writing, to the party of the second part, and the said party of the second part having failed to take such action within the said eight days as will, in the judgment of the party of the first part, remedy the default for which said notice was given, to take possession of

the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and, at the expense of said party of the second part, to complete or have completed the said work, and to supply or have supplied the labor, materials, and tools of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part and his sureties of the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this contract.

Article 5. It is further expressly understood and agreed that time shall be considered as an essential feature of this contract, and that in case of the failure upon the part of the [182] party of the second part to complete this contract within the time as specified and agreed upon, that the party of the first part will be damaged thereby, and the amount of said damages being difficult, if not impossible, of definite ascertainment and proof, it is hereby agreed that the amount of said damages shall be estimated, agreed upon, liquidated, and fixed in advance and they are hereby agreed upon, liquidated, and fixed at Twenty (\$20.00) dollars for each and every day the party of the second part shall delay in the completion of this contract, and the party of the second part hereby agrees to pay to the United States as liquidated damages, and not by way of penalty. Twenty (\$20.00) dollars for each and every day the

party of the second part shall delay in the completion of this contract, said delay not being the fault of the party of the first part.

It is further understood and agreed that the United States shall also have the right to recover from the party of the second part all costs of inspection and superintendence incurred by the United States during the period of delay, and also a reasonable value of any labor and materials that may be furnished by the party of the first part to the party of the second part during the time the latter is proceeding under this contract. And the party of the first part may deduct or retain all the above-mentioned sums out of or from any money or reserved percentages that may be due or become due the party of the second part under this agreement.

Provided, however, that if the party of the second part shall be strikes, epidemics, local or State quarantine restrictions, or by abnormal force or violence of the elements, be actually prevented from completing the work or delivering the materials at the time agreed upon in this contract, and such [183] delay is without contributory negligence on his or their part, such additional time may, with the prior sanction of the Commissioner of Indian Affairs and the Secretary of the Interior, be allowed him or them, in writing, for such completion as in the judgment of the party of the first part, or his successor, shall be just and reasonable; but such allowance or extension shall in no way affect the rights or obligations of the parties under this contract, but the same shall subsist, take effect, and be enforceable precisely

as if the new date for such commencement or completion had been the date originally herein agreed upon.

Provided, however, that the payment of said sum or sums as liquidated damages may, in the discretion of the Secretary, be waived in whole or in part.

Article 6. It is hereby further covenanted and agreed that the materials delivered and the work done under this contract shall be subject to the inspection of the party of the first part, or of other person or persons appointed by him, with the right to reject any part thereof not in accordance with this contract; and the decision of the said party of the first part shall be final.

Article 7. And it is further agreed by and between the parties hereto that until final inspection and acceptance of and payment for all the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

Article 8. It is further covenanted and agreed that in the execution of the said work the party of the second part will comply strictly with the provisions of the act of Congress approved [184] August 1, 1892, relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and the District of Columbia, and the act of Congress approved February 24, 1905, for the protection of persons furnishing materials and labor in the construc-

tion of public works.

Article 9. It is expressly agreed and understood by the party of the second part that in conformity to the requirements of section 3737 of the Revised Statutes, neither this contract nor any interest therein shall be transferred to any other party or parties, and that any such transfer shall cause the annulment of the contract so far as the United States are concerned; all rights of action, however, for any breach of this contract by the contracting parties being reserved to the United States.

Article 10. It is further agreed and understood that no Member of or Delegate to Congress, officer, agent, or employee of the Government shall be admitted to any share or part in this agreement or derive any benefit to arise therefrom.

Article 11. And the said party of the first part, acting for and in behalf of the United States, covenants and agrees to pay, or cause to be paid, unto the said part . . . of the second party, on the presentation of proper receipts for vouchers, in duplicate, to the Commissioner of Indian Affairs, the sum of Sixteen thousand six hundred (\$16,600.00) dollars, in lawful money of the United States, in consideration of the herein recited covenants and agreements made by the party of the second part, as follows: Eighty (80) per centum of the value of the work executed and actually in place to the satisfaction of the party of the first part at the expiration of each thirty (30) days during the progress of the work; the amount of each payment to be computed upon the actual amount of labor and materials expended [185] during the

said period of thirty (30) days for which partial payment is to be made (the said value to be ascertained by the party of the first party) the balance thereof to be retained until final acceptance of the entire work by the party of the first part.

Article 12. It is further stipulated and agreed that in the performance of this contract no persons shall be employed who are undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction.

Article 13. It is further agreed and understood that this agreement is not of full force and effect until approved by the Secretary of the Interior.

IN WITNESS WHEREOF, The parties hereto have hereunto *subscrib-* their names and affixed their seals this twenty-second (22) day of January, A. D. 19 7.

All erasures and interlineations made before signing and sealing hereof.

CHAS. F. CALHOUN,

ROBT. P. CAPPS,

(For party of first part.)

C. F. LARRABEE, [Seal]

Acting Commissioner of Indian Affairs.

WM. C. OWEN,

Pontiac, Michigan,

JAMES H. McNALLY,

Chicago, Ill.

(For party of second part.)

JAMES H. OWEN, [Seal]

(Principal to sign here with full first name.) [186]

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DEPARTMENT OF THE INTERIOR.

Washington, February 26th, 1907.

Approved ———.

E. A. HITCHCOCK,

Secretary.

Articles of Agreement between Commissioner of Indian Affairs and James H. Owen For Stone mess hall Rice Sta. Sch Ariz. Dated January 22, 1907. Expires 240 days after approval. Bond \$8500.00.

Registered, Contract Book No. 14, p. 6. [187]

PROPOSALS FOR BUILDING.

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs, Washington, D. C.,

December 8, 1906.

Sealed proposals plainly marked on the outside of the sealed envelope "PROPOSALS FOR BUILDING, RICE STATION SCHOOL, ARIZONA," and addressed to the Commissioner of Indian Affairs, Washington, D. C., will be received at the Indian Office until two o'clock, P. M., Jan. 16, 1907, for furnishing and delivering materials and labor to construct a stone mess hall with plumbing and gasoline gas piping, at the Rice Station School, Arizona, in strict accordance with plans, specifications and instructions to bidders, which may be examined at this office, the offices of the Arizona Republican, Pheonix, Ariz., Times, Los Angeles, Cal., and Improvement Bulletin, Minneapolis, Minn., Builders' Exchange, Los Angeles, Cal., the U. S. Indian Warehouses at Chicago, Ill., St. Louis, Mo., Omaha, Nebr., and San Francisco,

Cal., and at the school. For further information apply to J. S. Perkins, Talklai, Arizona.

C. F. LARRABEE,
Acting Commissioner. [188]

SPECIFICATIONS

of the labor and material required in the construction of Stone Messhall, #10, at Rice Station Indian School, Arizona, (23 pages) in accordance with the plans prepared by order of the Commissioner of Indian Affairs, which plans are hereby referred to and made a part hereof.

GENERAL CONDITIONS.

1. The entire work is to be executed under the direction and to the entire satisfaction of the Commissioner of Indian Affairs, or his representative, and in conformity with his instructions and such detail drawings as may be furnished from time to time during the progress of the work.

2. The contractor shall give his personal superintendence to the work, or shall have some competent person on the same at all times to act for him, and shall furnish all materials, labor, scaffolding, etc., necessary to complete the work according to the true intent and meaning of the drawings and these specifications, of which intent and meaning the Commissioner of Indian Affairs or his representative shall be the interpreter, and his decision in any and all cases shall be final and binding on the contractor.

3. The location and grade of the building will be indicated by the superintendent of the school, if the same has not been otherwise designated on the draw-

ings, and the site shall be cleared by the contractor for the reception of the structure, and should be examined by the contractor before bidding. The contractor must lay out his own work correctly, [189] and will be held responsible for measurements.

4. The grade line shown on drawings must be coincident with the highest point of the site selected for the building, and all exterior stepping, etc., will be made to conform with the requirements of the ground.

5. Inasmuch as the topography of the site may not be quite level, the contractor must, whenever it is necessary, furnish the services of a competent and approved engineer to lay out the work and establish levels, using the datum lines as laid down on the drawings.

6. It is intended that the drawings and specifications shall include everything requisite and necessary to the proper and entire completion of the work, notwithstanding every item necessarily involved by the same is not particularly mentioned, and so that when finished is to be delivered in a perfect and undamaged state.

7. Where no figures or memoranda are given, the drawings shall be accurately followed according to their scale, but figures or memoranda are to be preferred to the scale in cases of difference.

8. In any and all cases of discrepancy in figures or drawings, the matter shall be immediately submitted to the Commissioner of Indian Affairs or his representative for his decision, and without such decision said discrepancy shall not be adjusted by

the contractor save only at his own risk, and in the settlement of any complications arising from such adjustment the contractor shall bear all the extra expenses involved.

9. The contractor is required to exercise proper caution and care to verify the figures before laying out the work, and will be held responsible for any errors therein that otherwise might have been avoided. He shall promptly inform [190] the representative of the Commissioner of Indian Affairs in charge of the work of any errors or discrepancies he may discover, in order that the proper corrections may be made and understood.

10. The drawings and these specifications shall be considered as co-operative, and work or material called for by the one and not mentioned in the other is to be done or furnished in as faithful and thorough manner as though fully treated of by both.

11. The Commissioner of Indian Affairs, or his representative, may require the contractor to dismiss such workmen as he deems incompetent or careless, and is to have at all times access to the work, which is to be entirely under his control.

12. The contractor will be held responsible for all damages to the work, whether from fire or other causes, during its prosecution, and until the same is accepted. He shall be held responsible for all damages that may occur to persons, animals, or vehicles from want of proper lighting, watching, boarding, or inclosing, or any accident arising from defective scaffolding, or any negligence on the part of himself or his employees.

13. No masonry is to be constructed or plastering done during freezing weather. The contractor, however, with the consent of the Commissioner of Indian Affairs or his representative, may provide stoves and fuel for heating the building while plastering is going forward, and until it is completed, and all material and work are to be properly protected from the weather.

14. Except it be otherwise specified, all materials are to be of the best quality of their respective kinds, and all labor is to be done in the most thorough, prompt and workmanlike [191] manner, to the full satisfaction of the Commissioner of Indian Affairs or his representative.

15. In all cases, when a particular article or material is mentioned in these specifications, it is to be understood that other elements equal in quality, manufacture, and efficiency may be provided subject to the approval of the Commissioner of Indian Affairs, which approval must be obtained before substitution is made.

16. Detail drawings will be given of such portions of the work as the Commissioner of Indian Affairs or his representative may desire to explain more fully, and any work constructed without such detail drawings, except by permission expressly obtained, must be taken down and replaced at the contractor's expense, if so desired by the Commissioner of Indian Affairs or his representative.

17. All drawings and memoranda relating to the work are the property of the United States, and are to be carefully used and returned to the Commis-

sioner of Indian Affairs at completion, or cessation from any cause, of the work.

18. The contractor shall render assistance to the other mechanics in every way in which his special work can be of service, and such assistance shall be given promptly and thoroughly without additional charge.

19. The work shall be carried on systematically, and shall be so managed at all times by the contractor as to secure rapid progress and avoid annoyances and inconveniences.

20. The contractor and his employees must work in harmony with other contractors on the ground and in such order and places required by the Commissioner of Indian Affairs or his representative.

21. The contractor must remove all rubbish at the completion of the work. [192]

22. The Commissioner of Indian Affairs reserves the right at any time to make changes, alterations, or omissions from, or additions to, the work, or materials herein provided for, the valuation of which, if not agreed upon, to be determined on the basis of the contract unit of value of such material and work, or, in the absence of such unit of value, on prevailing market rates, which market rates, in the case of dispute, are to be determined by the Commissioner of Indian Affairs, whose decision with reference thereto shall be binding upon both parties, and that no claim of damages on account of such changes or for anticipated profits shall be made or allowed. The contractor will not be allowed any additional compensation for labor or materials un-

less he receives written authority from the Commissioner of Indian Affairs and the price agreed upon before execution of the work. That no addition to, or omission from, the work herein specifically provided for shall make void or affect the other provisions or covenants of the contract based upon these specifications, but the difference in the cost thereby occasioned, as the case may be, shall be added to, or deducted from, the amount of the contract; and in the absence of an express agreement or provision to the contrary, no addition to, or omission from, the work herein specifically provided for shall be construed to extend the time fixed herein for the final completion of the work.

23. Partial payments in no way to be considered as an acceptance of any work or material included in this contract.

24. The Commissioner of Indian Affairs reserves the right to order a cessation of all or any part of the work when, in his judgment, the interest of the Government demands the same. Such cessation not to impose extra expense upon the Government nor invalidate the contract. [193]

25. The Commissioner of Indian Affairs *reserve* the right to reject any or all bids, or any part of any bid, if deemed for the best interest of the Government.

26. Each bidder must understand that, should his proposal be accepted, the materials delivered, and the work performed by him, at any and all times during the progress of the work, and prior to the final acceptance of and payment for the same, shall

be subject to the inspection of the Commissioner of Indian Affairs or his representative, with the full right to accept or reject any part thereof; and that he must, at his own expense, within a reasonable time, remedy any defective or unsatisfactory materials or work, and that in the event of his failure to do so, after notice, the same will be remedied at the cost of the contractor.

(Special Attention.)

27. Bidders are requested to state in their bids the proposed price for each building, etc., and the length of time within which the whole work is to be completed and turned over. The time in which the work is to be completed is frequently an important consideration when making awards. Bidders should, therefore, name the shortest period within which they are prepared to do the work properly.

28. The attention of bidders is invited to the act of Congress approved August 1, 1892, entitled "An act relating *the* the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia"; also to the act of Congress approved February 24, 1905, entitled "An act to amend an act approved August 13, 1894, entitled 'An act for the protection of persons furnishing materials and labor for the construction of public works'"; also to Executive order May 18, 1905, to the [194] effect that no persons shall be employed who are undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction. (See 24 Stats., p. 411.)

29. Each bid must be accompanied by a certified check or draft upon some United States depository or solvent national bank in the vicinity of the residence of the bidder, made payable to the order of the Commissioner of Indian Affairs, for at least five per cent of the amount of the proposal, which check or draft will be forfeited to the United States in case any bidder or bidders receiving an award shall fail to promptly execute a contract with good and sufficient sureties; otherwise to be returned to the bidder.

30. Bids accompanied by cash in lieu of a certified check will not be considered.

31. Remove the sod and loam from within the inclosing walls of building and deposit where directed.

32. Excavate the ground as required by the site and drawings for all the footings, piers, etc., to the depth figured or shown, or to such depth as will provide absolute security against damages from frost or insecure foundations. This must be done irrespective of depths shown or figured on drawings, and without extra charge to the Government. The bottom of all trenches must be truly leveled and properly stepped where necessary. Excavations to be left open until walls are well set and dry. Surface water must be kept out of trenches, and any water that may get in must be removed by the contractor. Earth from excavations to be deposited where directed.

33. When walls are dry, fill up the superfluous width of all trenches with moist earth and ram solid,

and give the surface a proper grade to throw water from building. The contractor [195] is required to supply all the water necessary for the construction of the building.

34. The building is to be completed and ready for occupancy on or before the 1st day of September, 1907, and the successful bidder will be obligated in his contract not to ask for any extension of time.

(Stone Messhall, No. 10.)

NOTE—Sheet A.

TO ALL BIDDERS:

SEALED PROPOSALS, plainly marked on the outside of the sealed envelope: Proposal for Messhall, Rice Station Indian School, Arizona," and addressed: "THE COMMISSIONER OF INDIAN AFFAIRS, WASHINGTON, D. C.," will be received at the Indian Office until 2 o'clock p. m. of Jan. 16, 1907, for the work herein specified.

For additional information application should be made to Mr. J. S. Perkins, Superintendent, Talklai, Arizona.

The contractor must give careful attention to all reference Notes and the Articles of the "General Conditions," of these specifications, as he will be held strictly accountable for their proper application.

The Messhall will be located as shown on Block Plan, sheet No. 4, on a site recently occupied by a similar structure which was burnt.

All debris must be removed from building site. Existing walls and footings to be entirely removed. Such of the old material undamaged and applicable to the new construction, [196] and satisfactory

to the Superintendent, may be used. Abandoned materials to be disposed of as directed.

Malapi and "White Stone" are the available building materials and may be had at convenient distances from the school site. The Superintendent will select the sites of quarries from which the material is to be taken. The "White Stone" is readily quarried, being very soft and light, and can be cut and shaped with the crudest tools. Blocks of any size can be obtained without blasting.

Bidders are required to submit alternate proposal for substituting pressed steel ceilings, with cornices of suitable wood moulding, for all wooden ceilings. Proper furring strips, accurately leveled, to be secured to bottom of joists at suitable distances to receive ceilings. Edges of plates carefully lapped, joints well swedged, and all made tight and unnoticeable. Ceilings secured in position with fine wire nails and suitable buttons; and neatly painted at completion to the satisfaction of the Superintendent. Contractor to submit sample for approval of the Commissioner of Indian Affairs. Suitable grounds for securing wood moulding at angles of ceiling; moulding well put up and finished as specified for interior wood work, p. 16. In case steel ceilings are used the asbestos felt hereafter specified, p. 9, to be omitted.

STONE WORK.

All stone must be sound and of a homogeneous character, of kinds hereafter specified; quality and color to conform to stone in present buildings.

WALLS: All exterior and interior walls, to

bottom of [197] floor joists, foundations of chimneys, and footings for posts, to be of "Malapi" stone, laid to lines above and below ground; of best quality rubble masonry, well scabbled, solidly bedded and laid on natural beds with close joints. Joints on exterior below ground weathered to throw off water; above ground exterior faces to have neat flush joints. Large interstices filled solid with stone chips, bedded in mortar. Bond stones placed at frequent intervals and at corners; jambs and angles to have extra size stones, thoroughly interlocked. Walls built perfectly plumb and straight and to true lines and leveled up with large size stones to receive the superstructure. Best faces of stone above ground placed on exterior. Single stones of sizes shown on plan, sheet 3 for footings of posts, faces dressed moderately smooth; sides broken to good lines.

All exterior and interior walls and partitions above bottom of floor joists, excepting those partitions marked "stud" on plan, sheet 2, to be of the local soft white stone, similar to that of the buildings now in place, laid in regular or random courses, with horizontal beds and perpendicular joints, properly bonded. Neat flush joints for faces of exterior walls. Interior faces of all walls, including jambs and soffits of openings without doors, dressed moderately smooth for plastering. Stone partition walls to be thoroughly bonded into outside walls. Reveals of windows and doors and jambs of latter, in exterior walls, to be dressed smooth back to faces of frames.

Partitions marked A-A-A on plan, sheet 2, to be extended to under side of roof sheathing, forming fire stops; same to have no openings therein. Walls above height of 1st story ceiling to be of "White Stone," 9" thick. [198]

Mason must build all channels and leave apertures where required by plumber and gas fitter throughout the work, and insert, as the work progresses, all bolts, anchors, plats, lugs, backsills and lintels, wood bricks, etc., necessary for other trades and deemed necessary by the Superintendent.

Mason to assist carpenter in setting door and window frames and see that they are kept well braced, built solidly in walls and all crevices filled with mortar. Subsills of *windwo* frames set solidly in cement where bearing on masonry.

Where exterior appendages abut against stone walls the stone is to be dressed to allow a close contact.

Walls covered and protected from storms during construction, and thoroughly cleaned down at completion.

CUT STONE.

WINDWO SILLS: Stone sills for *windwos*, 7" thick, bedded on ends only, pointed up after walls are built, and 3" longer than clean opening, sawed or cut beveled, with rock faces and pitched arrises, to extend at least 2" under outer edge of sub-sills. Contractor has option to finish *windwo* sills with smooth dressed faces.

Sills for exterior doors of concrete as hereinafter specified, p. 6.

LINTELS: Stone lintels 14" high for exterior and interior openings through masonry walls. Exposed faces and soffits of lintels over exterior doors and windows rock face or dressed smooth. All cut 12" longer than clear openings. [199]

GREASE TRAP TOP: Grease trap top of hard stone, 4" thick, with opening cut for C. I. cover. Arrises squared and exposed surfaces hammer dressed.

CLEANING & PROTECTION: All cut stone properly protected and covered during construction, broken and defective parts made good and all thoroughly cleaned at completion.

BRICK WORK.

Brick to be sound, hard and well burned and satisfactory to the Superintendent. To be moistened when weather conditions require. All joints thoroughly filled and slushed with mortar, leaving no empty spaces.

CHIMNEYS: Build chimneys where shown on drawings, in lime mortar to under side of roof sheathing. Use selected hard, red brick above roof, laid in cement and lime mortar as hereinafter specified,—see "Mortar," (this page), with neat struck joints $\frac{3}{8}$ " thick, outside and inside. Outside of chimneys plastered opposite all timbering. Set galv. sheet iron thimble of requisite size in each smoke flue and C. I. clean-cut door at base of same. The last two courses of chimney tops laid in cement, and covered with a layer of equal parts Portland cement and sand, $\frac{3}{4}$ " thick, weathered to shed water.

GREASE TRAP: Construct grease trap as per

detail (sheet 3) and where shown on plans, sheets 2 and 3, of hard brick or "Malapi" stone, laid in natural cement mortar and extending from grade line to requisite depth below same, provided with stone top and C. I. cover as specified under Stone and Iron Work, respectively. Thickness of walls 9" if of brick and 12" if of stone.

Lay bottom with concrete as hereinafter described for Concrete Floors, this page. Plaster sides with Portland cement, [200] extending from floor to top of inlet pipe, see detail, sheet 3; also "Plumbing," page 17.

CEMENT.

All cement required by these specifications to be the best quality, approved brand, freshly ground and in perfect condition.

MORTAR.

Mortar for stone work below the first floor joists and chimney tops, of equal parts lime and natural cement, and three parts clean, sharp sand.

For the superstructure use freshly burnt lime and clean, sharp sand, one part lime to three parts sand.

CONCRETE.

CONCRETE FLOORING: The entire floor surface of Bakery to be filled with earth to proper height, deposited in layers 6" thick; each layer thoroughly tamped to avoid future settlement. Top surface brought to proper grade, leveled and rammed, and covered with 4" of concrete, composed of one part Portland cement, 3 parts clean, sharp sand, and 5 parts stone, broken into 2" cubes, or clean, coarse gravel, covered with a $\frac{3}{4}$ " capping, composed of one

part Portland cement and two parts clean, sharp sand, thoroughly incorporated with base before latter sets, and troweled smooth and even to cement finish. Capping to be covered with sand and kept moist for at least 7 days.

HEARTHS: Kitchen hearths to have earth filling as specified for Concrete Flooring and receive similar concrete floor and cement cap, top surface of latter troweled smooth and even and finished 1" above adjoining floor level against beveled pine borders, as hereafter specified, p. 13. [201]

DOOR SILLS: Sills for all exterior doors constructed of concrete as specified for "Concrete Flooring," of clean, coarse gravel and 7" thick; to extend through full thickness of walls, and be finished with cement capping for exposed surfaces as specified for "Concrete Flooring," top surfaces beveled and faces to extend 1" beyond face of walls. All left perfect at the finish.

STEP FOUNDATIONS: To be of concrete, as specified for door sills, similarly capped, of sizes shown, not less than 4" thick.

IRON WORK.

Furnish and set all structural iron required or shown on drawings.

Wall plates secured with $\frac{5}{8}$ " bolts, 30" in length, with necessary nuts, washers, etc., and not over 8' from centers. One at every splice in plate, at each side of chimneys and at corners.

Provide and put in place for trusses 1" diameter suspension rods with upset screw ends for threading, with nuts and washers; also $\frac{5}{8}$ " bolts at heels of same,

with all necessary nuts and washers, two bolts to each heel of truesses.

Approved iron anchors for stoop framing.

Anchor bolts for wall ends of stud partitions with necessary nuts and washers, three in the height of story. Iron anchors for exterior door jambs, 3 in height of jamb, on each side, secured to jamb and built solidly into walls.

Cast iron clean out door and frame at base of each smoke flue. [202]

GREASE TRAP COVER: Approved cast iron cover with suitable locking device for grease trap,—see detail, sheet 3.

VENTILATING REGISTERS: Japanned ceiling registers, 16" diameter, for kitchens and bakery, where shown on plan, sheet 2, provided with necessary cords and pulleys.

GALVANIZED IRON WORK.

VENTILATORS: Star or Anchor ventilators of galv. iron placed on roof where shown for ventilation of loft.

Approved wire or metal lath properly secured across chases and where stud partitions join masonry walls, and at other points where required.

Galv. sheet iron thimble and cover for each smoke pipe where required.

Galv. iron wire netting properly secured at front of all slat ventilators.

CARPENTRY.

Materials: Preferably all framing timber and finishing lumber of the kinds hereafter specified, but native or local products of suitable, durable and ap-

proved quality may be substituted, of sizes given on drawings, thoroughly seasoned, free from shakes, large knots or other imperfections impairing its strength or durability, square edged. All timbers, girders, trimmers and joists properly framed; no framing placed within 2" of brick work of any smoke flue. All framing must be done with a view to prevent excessive shrinkage or unusual settlement. Headers and trimmers double joists, thoroughly spiked together; headers mortised and spiked to trimmers and tail joists framed into headers. All joists sized to an even depth and properly cambered, laid solidly on the walls and bridged with 1½" x 3" [203] herring-bone cross bridging, once in every 8' of span. Bridging closely fitted and secured with ten penny nails, two at each end. Double and triple joists where required by drawings,—see sheets 2 and 3, well spiked together under partition in 1st story and posts in left, not otherwise supported from below. Properly trim around chimneys, scuttles, hearths, roof ventilators, etc.

SIZE OF TIMBERS: Floor joists 2" x 10", 18" o.c., and 16" o.c., as noted on plan, sheet 3. Ceiling joists 2" x 8", 24" o.c. Studs 2" x 4", 16" o.c. Plates and sills for stud partitions 2" x 4". Wall plates 2" x 12". Hip and valley rafters 2" x 10". Common rafters 2" x 6", 24" o.c. Other roof timbers as given on drawings and as required.

ROOFS, etc.: Roofs framed as shown. Trusses built and located as shown on drawings, see sheets 1, 2 and 4. Bearing plates consisting of one piece of 2" x 12" timber 6' 0" long, placed under wall plate at

each heel of trusses; bearing and wall plates well spiked together—see detail, sheet 4. Purlins notched over principals and thoroughly spiked; those in rear of building halved and spiked at corners as shown, see sheet 2, well secured to posts, latter strongly braced, and foot on triple ceiling joists where noted, latter strongly spiked together. Rafters notched over and thoroughly spiked to purlins, spiked to ridge poles, hip and valley rafters and, where practicable to ceiling joists. Where no trusses are used, posts where shown to extend up for support of roofs and purlins in solid and substantial manner. Rafters in roof over kitchen, etc., framed to form light trusses as shown—see detail, sheet 4, well braced and strongly spiked together. Contractor has option to make purlins of one piece, or build same up of timbers 2" [204] thick, of requisite depth, to sizes shown on drawings, strongly spiked together. Splicings to occur over supports only, and if solid timbers are used, reinforced with wrought iron fish plates, $\frac{1}{4}$ " x 2" x 24", thoroughly bolted to each side of same.

Ceiling joists over Mess hall notched over 2" x 2" strips, spiked to tie beams, and thoroughly secured—see detail, sheet 4, and Section, sheet 1.

Wall plates solidly laid on and anchored to walls as heretofore specified, p. 4. Angles and splices halved and spiked. The contractor must provide all necessary supports for roofs to make a strong and substantial construction.

POSTS: Posts for support of girders, stoop framing, platform, purlins, etc., of sizes shown, solid,

with ends sawed square, insuring perfect bearing in all cases. Posts on exterior of building surfaced or cased with dressed pine where exposed to view.

GIRDERS: Wooden girders where shown on plans, of sizes given, in one piece or built up, as specified for Purlins, see p. 8. Splices for solid girders as specified for purlins. No splices in girder over Employes' Kitchen; latter to be made of full length timbers, and either dressed or cased with dressed pine.

SHEATHING: Cover all roofs and faces of dormers with $\frac{7}{8}$ " boards, dressed one sides, edged, laid close and securely nailed to each bearing.

SHINGLES: All roofs, including roofs and faces of dormers, to be covered with No. 1 redwood or cypress shingles, 16" long, 6 butts to 2", laid $4\frac{1}{2}$ " to the weather; eaves and hips doubled. Ridges saddled with $\frac{7}{8}$ " x 8" pine. [205]

A layer of asbestos felt, to weigh not less than 10 lbs. to 100 sq. ft., to be placed on bottom of ceiling joists over Bakery and both Kitchens, as shown on detail, sheet 4, well lapped and tacked down.

CORNICES: Construct cornices where shown, and as detailed on sheet 4. Placeer $\frac{7}{8}$ " matched pine. Frieze board $1\frac{1}{8}$ ". Facia $\frac{7}{8}$ ". Crown and bed moulds as shown. All of pine, substantially put up.

Make suitable saddles against chimneys to turn off water.

STUDDING: Studding carefully straightened, doubled at each side of opening for door to W. C. and at angles, trussed over opening and bridged once

in height of story; thoroughly and securely nailed to cap plates and sills. Corners made rigid and solid in the best manner, providing thorough nailing for lath.

BACK SILLS: Back sills for all windows to extend 4" into each jamb—see detail, sheet 4.

WOOD BRICKS: Furnish to mason all wood bricks, etc., necessary for securing trim, bases, etc.

GROUNDS: Set proper size grounds for plastering at all openings, wainscoting, bases, etc., wherever required, straight and plumb; those for wainscoting placed at floor, top and mid-height.

STOOPS & STEPS: Construct stoops and steps at front and sides of building, as shown on drawings, of clear pine, free from pitch and well seasoned. Joists for stoops 2" x 6". Carriages 2" x 12", 3 each for short and 4 for long steps, respectively. Under side of treads, seats of same on carriages and ground ends of latter painted as hereafter specified under "Painting." [206] All framing timbers anchored to walls to the satisfaction of the Superintendent, and where exposed to view, surfaced or eased with dressed pine.

Flooring for stoops 1 $\frac{1}{8}$ " x 3 $\frac{1}{4}$ " face, as hereafter specified for general flooring, nosed on outer edge, dressed one side, laid with white lead in joints and blind nailed to each bearing. Scotia under outer edge. Treads and risers of same material as specified for flooring. Treads 1 $\frac{3}{8}$ " thick. Nosings returned and moulded. Risers $\frac{7}{8}$ " thick. Leave $\frac{1}{4}$ " space between risers and treads, and slope latter forward. Risers in no case to be over 7" and must be

carried to ground irrespective of number shown on plans.

PLATFORM: Construct ice platform where shown on drawings of pine, as specified for stoops. Joists 2" x 8". All framing timbers properly anchored to walls to the satisfaction of Superintendent, and where exposed to view, surfaced or cased with dressed pine. Flooring of planks, 1½" thick, as hereafter specified for general flooring, dressed one side, edged, laid close and *h*thoroughly nailed.

DORMERS, etc.: Dormers and slat vents constructed in a substantial manner, as shown—see "Windows," p. 12. Mouldings, casings, etc., as required.

INTERIOR FINISH: The whole of the interior finish of No. 1 pine, free from all blemishes, sand papered and made perfectly smooth before priming coat is applied. No mill work to be taken into building before plastering is completed; that brought on ground must be primed immediately, kept dry, and carefully stored under cover until required for use.

Full trim at all points. Wire finishing nails used for securing trimmings, properly set and stopped with putty after priming coat is applied. [207]

FLOORING: Flooring for 1st story (except Bakery) to be clear, matched, vertical grain Southern yellow pine, 13-16" x 2¼" face, tightly strained and blind nailed, and laid after plastering is completed. All over wood planed off, butt joints well secured. Bakery floor of concrete, as hereinbefore described, p. 5.

DOORS: Interior door frames, except otherwise

noted, $\frac{7}{8}$ " thick, rabbet formed by o. g. stop, $\frac{1}{2}$ " x $\frac{13}{4}$ ". Transoms (T) where required by drawings. Jamb linings for doors between Mess hall one side, and Kitchen and China Closet on the other side, as per detail, sheet 4. Exterior door frames $\frac{13}{4}$ " thick, rabbeted, ploughed on back thoroughly primed with lead paint before setting, provided with wind breaks and secured by jamb anchors as heretofore specified, page 8. Suitable frames for batten doors in foundation walls, and exterior door to refrigerator.

Doors throughout, except otherwise required, No. 1 o. g. pine stock, five panels, mortised and tenoned, wedged and glued, hung as indicated on plans. Panels raised. Sizes of doors as *as* given on plans. Transoms $\frac{13}{8}$ " thick; stationary and screwed in place, except that over refrigerator, which will be hinged at bottom. Height of transome (omitting that over refrigerator) to be governed by the height of stone lintels over windows, the lintels being on a uniform level throughout. Imposts neatly moulded. The usual thresholds for interior doors to be omitted, and doors cut with minimum joints at floor. Hard wood, rubber tipped strikes for all doors where required. Exterior doors provided with drip strips on bottom rails. Astragal joints for double doors. Batten doors where noted for openings in exterior foundation walls constructed of $\frac{7}{8}$ " matched and beaded pine, braced and battened, secured with screws. [208]

Similar door of $1\frac{1}{8}$ " matched and beaded pine for exterior door to refrigerator.

WINDOWS: Box frames for windows not otherwise specified; to have pulley stiles, $1\frac{1}{8}$ " thick, of vertical grain pine, with long pockets and covers screwed in place. Hanging stiles $1\frac{1}{8}$ " x 2". Rab-beted plank frames for cloak room, $1\frac{3}{8}$ " thick. For dormer lights and slat vents, $1\frac{1}{8}$ " thick. All sub-sills $1\frac{3}{8}$ " thick, set in cement. Window stops se-cured with round headed blued screws. All frames in masonry walls to have suitable wind breaks; and be primed all around with lead paint before setting, ommitting pulley stiles, and surfaces to have natural wood finish. Stools $1\frac{1}{8}$ " thick, nosed and moulded, with ends returned.

CHECK RAIL sash of white pine, $1\frac{3}{4}$ " thick, double hung with best braided cotton cord for all box frames. W. C. to have similar sash, $1\frac{3}{8}$ " thick. Hinged sash $1\frac{3}{8}$ " thick for all rabbeted frames, in-cluding those of dormer lights and slat vents; latter grooved for slats, spaced 7 to a foot, and inclined to exclude driving rains; matched pine storm shutters hinged in rear of slat vents. Under cut drip strips on bottom rails of all hinged sash.

WAINSCOTING: The entire first story to be wainscoted with $\frac{5}{8}$ " x $3\frac{1}{4}$ " clear, matched and beaded pine, finished with approved moulded cap-ping and $\frac{7}{8}$ " x 6" beveled top base, neatly scribed to floor—see detail, sheet 4. For cloak room height to be same as height of window stools, finished with capping of same profile as stool, of which it will be a continuation. For remainder of building the height to be 3' 6". Wainscoting to be returned through openings without doors. [209]

ARCHITRAVES: Architraves $\frac{7}{8}$ " x 4" for all doors and windows. Plinth blocks for doors. All carefully put up with neat corner blocks or mitred. Windows to have jamb and soffit linings as shown by detail, sheet 4. Openings without doors to have no architraves. Windows finished as per detail, sheet 4.

SHELVING: Shelving in pantries and china closet as required and shown, 14" wide, $\frac{7}{8}$ " thick, beaded, substantially put up as indicated on plan, sheet 2, or as required. Counter shelf where shown, $1\frac{1}{8}$ " thick and 1' 8" wide.

SCUTTLES: Construct scuttles, 2' 6" x 2' 6", in ceilings, where shown on plan, sheet 2, of matched and beaded pine; to be flush with ceilings and supported on neat $2\frac{1}{4}$ " mouldings skirting openings.

LINING, etc.: The entire ceiling of first story lined with matched and beaded pine, $\frac{5}{8}$ " x $3\frac{1}{4}$ ", properly put in place and secret nailed. Quarter round moulding to be placed in angles of ceilings.

PICTURE RODS: Provide and put in place $1\frac{1}{2}$ " pine picture moulding skirting walls and partitions of both Messhalls, thoroughly secured in place.

PICTURE RODS: Provide and put in place $1\frac{1}{2}$ " pine picture moulding skirting walls and partitions of both Messhalls, thoroughly secured in place.

DRIP BOARDS: Grooved drip boards, $1\frac{1}{8}$ " thick for sinks where shown on plan, sheet 2.

HEARTH BORDERS: Beveled borders for both kitchen hearths of hard pine, 1" thick. [210]

HOOK STRIPS: Beaded hook strips where directed. Those in Mess hall put up at discretion of Superintendent.

REFRIGERATOR: Furnish and set where shown on plan, sheet 2, one Refrigerator of oak; to have dimensions not less than 10 feet in length by 4 feet deep, by 8 feet high; equal to that of the McCray Refrigerator & Cold Storage Co., of Kendallville, Indiana, catalogue plate No. 171, with two doors in ice chamber, one in front and other in rear, latter accessible from outside for icing purposes,—(See Floor Plan, sheet 2). Refrigerator to have separate compartments for the dairy products; and for the meats, vegetables, etc. Upper half of entrance doors to have glazed panels, of two thicknesses of glass each. Compartments fitted up with slatted shelves; that for meats provided with suitable hooks. Refrigerator constructed of best quality materials; walls and doors insulated with mineral *wood*. To be lined with odorless wood, and have approved fastenings for doors. Refrigerator waste to be indirectly connected with drainage system through 1½" galv. iron pipe, latter to be provided with trap and clean-out conveniently located—see plans, sheets 2 and 3.

Contractor to provide and apply in best manner all hardware required to thoroughly complete the work. Best quality oxidized copper finish, except where otherwise specified.

LOCKS: Easy spring, 3 tumbler, mortise knob locks, 3¾" x 3⅛", with fronts, striking plates and bolts and two N. P. keys to each. For main entrance doors use 4⅝" x 3⅝" locks, with latch work or mortise latch and pass keys. Approved padlocks, hasps and staples for batten doors in foundation

walls, and exterior door to refrigerator.

HINGES: Two loose pin tipped hinges, $3\frac{1}{2}$ " x $3\frac{1}{2}$ ", [211] for interior doors generally; 3 for exterior doors; those for front doors being 4" x 4"; For swinging sash, scuttles and transom over refrigerator door, $2\frac{1}{2}$ " x $2\frac{1}{2}$ ". Suitable hinges for storm shutters back of slat vents.

KNOBS AND BOLTS: Plain oxidized copper on steel knobs for all doors on first floor, provided with rose and key escutcheons combined. The standing leaf of double doors provided with flush bolts, 10" long at bottom and 18" long at top, with keepers. Iron barrel bolts 3" long for storm shutters back of slat vents and sash in dormers.

SASH FASTENERS AND LIFTS: Approved sash fasteners and hook lifts for all double hung sash. Lifts two to a sash. Approved T handle cupboard turns of oxidized copper for swinging sash in cload rooms.

SASH CORDS, WEIGHTS & PULLEYS: Best braided cotton cord and cast iron weights for sash where required. All box frames provided with best wrought pin and polished wheel pulleys 2" in diameter.

COAT HOOKS: Provide and put up 22 dozen japanned iron, double coat hooks of large size, distributed in cloak room and where directed; those in cloak room secured on wainscoting in two staggered rows,—(. . . .); those in Mess-hall put up at the

discretion of Superintendent.

TRANSOM LIFTS: Provide suitable transom lift

for transom over refrigerator, satisfactory to the Superintendent.

DOOR STRIKES: Hard wood, rubber tipped strikes where required. [212]

LATHING AND PLASTERING.

All plastering to be three coat work, scratch coat, browning and float finish, which must be of a standard and approved hard wall plaster, prepared in accordance with the manufacturer's directions, and applied with cork or felt float.

Plaster carried to the cloors everywhere, straight, out of wind, free from chip cracks or other defects. Sand to be clean and sharp, free from loam and other impurities.

Laths seasoned pine, spruce or fir, laid $\frac{1}{4}$ " open and breaking joints every sixth course, slightly moistened before plaster is applied.

Lath and plaster all stud partitions and plaster all stone walls of 1st story as required. Stone walls thoroughly moistened before applying plaster.

Plaster jambs of windows having box frames,—see detail, sheet #4; also jambs and soffits of openings without doors.

Plasterer to do all necessary pointing up after other workmen.

TINNING.

Valleys to have 20" linings of prime charcoal tin, I-X thickness. Intersection of dormers with roofs treated as valleys.

Flash and counterflash at all chimneys, ventilators, dormers and at all other places about or in connection with the roofs where flashings are necessary, using

best quality I-X terne plates, in sheets 14"x 20", thoroughly secured. Black iron or uncoated plates to weigh not less than 115 lbs., and the coated not less than 140 lbs. per 112 sheets. Manufacturers name and brand to be plainly stamped on each sheet. Flashings well secured, extended into joints of brick work at least 11½", thoroughly wedged and calked with slater's cement. Painted on under side before laying and as hereafter specified, p. 16. [213]

Cover the top of saddles at chimneys with tin, as heretofore specified. All soldering done with rosin flux, without the use of acid. Warrant all water tight.

PAINTING AND GLAZING.

All exterior surfaced wood work, including platform, steps and stoops, with their floors, to receive three good coats best white lead paint and finished in two shades, selected by the Superintendent. Under side of treads, seats of same on carriages and ground ends of latter painted two good coats of best metallic paint.

Roof ventilators primed with metallic and finished with two coats of lead paint. The vent pipes above roof, grease trap cover, and other exposed iron work to receive a coat of asphaltum varnish. All exposed tinning to have two coats of best metallic, ground in oil.

All interior surfaced wood work (omitting floors, pulley stiles and ceilings) thoroughly filled to the satisfaction of the Superintendent with approved liquid filler, properly applied for open grained wood; for close grained wood, use a priming of shellac; said

papared when dry and hard. Complete with two coats of transparent wood finish, rubbed down between coats with curled hair or its equivalent. Fronts of shelving similarly finished.

Pulley stiles to receive two coats of shellac, sand papared between coats. Fillers and varnishes to be of approved quality, equal to the best product of Berry Brothers.

All knots to receive a coat of shellac before priming and all nail sets filled with putty after priming coat is applied. Putty for varnished work color of the wood.

All pipes in view pertaining to plumbing to be painted as may be directed. [214]

Matched pine ceilings and scuttles to receive two good coats of linseed oil. Also, all finished flooring after the entire work of the building is completed and floors properly cleaned.

GLAZING: All glass the best American, double thick, well sprigged and secured with dark putty. Rabbets for glass thoroughly primed before glazing.

All left perfect in every particular at the finish.

PLUMBING.

EXTENT OF WORK: The work to be performed embraces the complete water supply, soil and waste systems for the building, together with all fixtures, properly set up and in effective working order, complete, with all labor and material as herein specified or to the extent indicated on plans. No pipes, fittings, or work of any kind shall be covered up or hidden from view before they have been examined and approved by the Superintendent in charge.

SOIL & WASTE SYSTEM: All soil and waste pipes 2" and over to be of cast iron (except where indicated on sheets 2 and 3 to be of T. C. pipe), standard weight; tar coated inside and outside, and properly supported with hangers or pipe rests. All joining of cast iron pipe and with their respective fittings will be done by caulking with oakum or jute and the bell filled with molten lead, thoroughly tamped. All waste pipes 1½" and smaller to be galv. iron, with galv. iron recessed fittings. Connections of lead with iron pipes made with brass ferrules and wiped joints. Short connections to fixtures with extra strong lead pipe. All connections with Y's and proper bends.

Terra cotta drain pipe to be laid to uniform grade. [215] Bells sunk below grade of trench, insuring solid bearing. Joints with hydraulic cement. To be continued to sewer in place and connections therewith made in best manner through approved fittings, (see sheets 2 and 3 and Block Plan, sheet 4).

Provide 4" x 4" x 17" long sanitary "T" branch of cast iron for grease trap, set as shown on detail, sheet 3, and properly connect same to terra cotta drain pipe as directed.

All soil and waste pipes must be of the sizes noted on plan and as required. Waste pipes so arranged as to admit of inspection and cleaning, to this end they must be fitted with brass clean-out screws, or other clean-outs, placed at convenient points and making pipes accessible. Each vertical stack to have base elbow with clean-out screw. Dead ends of waste pipes to be provided with vents, extending

through roof.

VENT PIPES: All rising waste pipes to extend through roof for ventilation, increasing one size as they pass through roof and properly flashed around with copper or lead where extending through roof to prevent leakage.

Vent pipes 3" and larger to be of wrought iron standard weight; pipes 2" and under to be galvanized iron, with galvanized fittings.

WATER SUPPLY PIPES: Main supply to building to be 1 $\frac{1}{4}$ " galv. iron, connected to water main in place at most convenient point,—see Block Plan—sheet 4. Extend this main full size to point in kitchen, where directed, and branch to sinks, slop sinks, etc., as required. At point within building, where service pipe enters, place a suitable stop and waste cock, controlling supply to building.

All water pipes to be of galvanized iron, thoroughly secured and placed to avoid freezing. To this end they must run [216] on interior walls where practicable. Pipes properly graded to drain free, and where run on ceilings, they must be supported with neat hangers. A stop and waste cock to be placed at base of all rising lines.

The complete system of piping to be tested for leaks and all such made tight immediately. Test made at the expense of contractor.

Plumbing warranted water tight, stench proof and perfect in every particular.

FIXTURES, ETC.

RANGE BOILERS: Provide and place where shown in kitchen, a standard galvanized iron range

boiler, capacity 79 gallons, supported on plain cast iron boiler stand. Also in Employes' Kitchen a similar boiler, capacity 52 gallons, on similar stand. All connections to be with ground joint couplings. Provide boilers with sediment wastes and hose bibbs, and make all connections with ranges and fixtures as required.

SINKS: Provide and set in kitchen, one 22" x 62", and in Employes' Kitchen and in Bakery each one 18" x 36" galvanized iron sink. Sinks provided with backs and supported on brackets or legs. Wastes from kitchen sink 2" lead, 9 lbs. per ft.; for Employes' Kitchen and bakery, 1½" lead, 7½ lbs. per foot. All connected to general drain as required or shown,—sheets 2 and 3. Wastes trapped and vented (traps to have brass screw clean-outs). Supply for sinks through ¾" pipes and ½" finished brass Fuller bibbs, properly connected up for hot and cold water.

SLOP SINKS: Provide and set up in Messhall, each Kitchen, and Bakery, where shown on plan,—sheet 2, iron, roll rim slop sinks, 16" x 20", with iron backs and ends, where required. [217] Iron vented trap standards, properly connected with drainage system. Enameled for Messhall and other galvanized. Finished brass Fuller bibbs. Make all connections for hot and cold water supply.

WATER CLOSET: Provide and set complete, where shown, an approved porcelain lined iron, siphon jet water closet, with flushing rim. Hard wood, copper lined, noiseless siphon flushing tank, capacity 7 gallons, of approved pattern, supported on N. P. brackets, with N. P. chain and pull. N. P. sup-

ply and flush, properly secured. Polished ash or oak seat with flap, secured to bowl. Closet set on pure rubber gasket.

LAVATORY: Furnish and set up, where shown, one 20" x 24" marble lavatory, with 10" back complete. Oval bowl 14" x 17". Overflow, N. P. plug and rubber stopper. N. P. Fuller bibbs for hot and cold water. Chain and chain stay. N. P. brackets. N. P. brass trap and waste Trap ventilated. Connect with water and drainage systems as required.

GASOLINE GAS PIPING.

All piping to be concealed and the building is to be piped in strict accordance with the following specifications, and for the number of lights indicated on plans. Piping to be plain black iron.

The location of risers to be as near the point of entrance of main as circumstances will permit and on an inside wall and in such position as will permit a fall of the same with the least cutting of joists. One or more risers to be used if found necessary to avoid such extensive cutting.

The points of connection with risers must be kept low enough to insure proper fall for horizontal pipes.

All piping must have a fall of at least $1/16$ " to the [218] foot, and where exposed to cold, a fall of $1/8$ " to a foot must be secured.

Where pipes cannot be run to risers without excessive cutting of joists, they must be laid with a fall towards convenient points where relief or drip pots are to be attached so that the condensation can be collected.

The fall of the piping must be established accur-

ately by spirit level and not by joists or floors, and all traps or sags must be avoided.

Pipe to be secured with gas fitter's hooks and in such manner as to make it impossible for any portion to settle and form traps.

All drops must be taken from the side or top of main line of pipe, and run horizontal to location of drops. The drop must be securely screwed up, well stayed both at top and bottom of joists, hung plumb and brought about 3" below joists. Where pipe is run on a wall, the stone is to be chipped out to allow the pipe to be sunk so that the plaster will fully cover it.

Use white lead mixed with boiled oil for making joints, being careful not to get so much in the fitting or in the pipe that when screwed together the lead will close up the opening.

No risers to be less than 1" (inside) diameter, and no pipe, even to supply one light, is to be less than $\frac{3}{8}$ ".

Each piece of pipe must be looked into or brown through to see that the bore is clear. No pipe to be laid on an outside wall or in exposed places. If impossible to avoid doing this, they are to be well protected with felt covering.

The rising main in building must be located as directed by Superintendent.

Following table gives the proportionate sizes and lengths of pipe to be used: [219]

Size of Pipe:	Greatest Lengths Allowed:	Greatest Number of lights:
$\frac{3}{8}$ inch	15 feet	3
$\frac{1}{2}$ "	20 "	6
$\frac{3}{4}$ "	50 "	12
1 "	75 "	25
$1\frac{1}{4}$ "	90 "	75
$1\frac{1}{2}$ "	125 "	100
2 "	150 "	200

After the pipe is in and capped up, it must be tested with mercury pressure gauge, with 6" column mercury, which must remain stationary for a period of five minutes. If there are any large leaks, either sand holes or splits, the defective pieces must be taken out and replaced by perfect ones. If the leaks are very small, they may be repaired by calking, with the pressure on, using soap suds to tell when the leak is stopped, and then cement them. Cementing must not be done without first calking.

Pipe must not be placed near hot water pipes.

Contractor to make connections with gas main in place where same is of sufficient capacity and extend branch to building of proper size to supply the entire number of lights, satisfactory to the Superintendent, and branch to rising lines as required.

FIXTURES.

All fixtures to be of iron pipe, well made and substantial, in accordance with accompanying drawings. All finished oxidized copper. Stems not less than $\frac{1}{2}$ " and arms $\frac{1}{4}$ inch. Fittings cast brass.

Number:	Spread:	Design No.:	Ceiling:
12—2 light pendants	24.....	2	13' 0"
8—2 " "	24.....	2	14' 0"
9—1 " "	1	14' 0"

[220]

Adjustable Bunsen burners, with Welsbach mantels No. 197, 80 C. P., and brass parts No. 34, best mica chimneys, globes and holders, provided by contractor, for all lights where shown.

Approved:

(Signed) C. F. LARRABEE,
Acting Commissioner of Indian Affairs.

FORM OF PROPOSAL.

The undersigned hereby propose to construct, build, and complete the Stone Mess Hall, at Rice Station Indian School, Arizona, in compliance with the terms of the advertisement, copy herewith attached, and to furnish all the labor and materials required in the construction and completion of said _____ in strict accordance with the drawings and specifications furnished therefor by the Office of Indian Affairs:

For the building complete, as specified, \$_____.

For sub. pressed steel ceilings, etc. for all

wooden ceilings, complete, as specified, \$_____.

For _____, complete, as specified, \$_____.

For _____, complete, as specified, \$_____.

For _____, complete, as specified, \$_____.

It is also agreed that _____ will complete and turn over to the Government said _____ on or before the _____ day of _____, 190____ (See Section 27 of printed page of specifications.)

(Testimony of James H. Owen.)

Inclosed find certified check for \$—— on Bank
of —— dated ——, 190——.

[221]

Name in full of each member of the firm should
be given if the bid be made by a firm.

WITNESS.—(Continuing.) There is no substantial difference in the structure called for in the plans and specifications under which I operated when I built my building, and the structure called for in the plans and specifications of Augustus W. Boggs which I have just examined. They are not the same, but substantially, a few minor changes. The outside walls and the largest part of the work is substantially the same. The roof is substantially the same roof. The contract price between myself and the United States Government for the structure that I erected under my contract and the plans and specifications (being United States Exhibit "AA") is \$16,600, which was the reasonable value of the construction of the stone mess-hall and kitchen that I built in accordance with that exhibit. That was the reasonable cost of that structure. There were other bidders at the time I submitted my bid prior to entering into this contract. I was in Washington at the time. I was the lowest bidder.

If the Government had asked for proposals on both of the contracts, my bid would have been from three to five hundred dollars higher under the second. The second contract involved work additional to that

(Testimony of James H. Owen.)

required by the first contract, to the amount of from three to five hundred dollars.

The reasonable value of the additional work under the second contract was three to five hundred dollars. This difference was due to the minor differences about which I have [222] testified in the plans and specifications of the two jobs. I received my money from the Government under my contract. That is, the \$16,600 named therein, less what material the Government furnished me. That was material on the ground that they valued at so much money and turned it in toward my payment on the contract price. As I remember it was lumber and stone; I think there was some nails, paper,—I can't remember all the items. I received \$16,600 less whatever allowance was made for that material that I testified to, less—they discovered an error and charged me \$1500 or \$1600 on that after that, I think. I don't remember what the deduction on account of the contract price was.

Looking at a letter which is handed me, I allowed them to deduct \$1162.98. I suppose that was a little above the market value of the material that the deduction covered. The Government turned over that material to me.

Cross-examination.

(By Mr. BOWEN.)

Speaking generally, the cost of building increased during the years 1905-6-7 and has been increasing ever since. Some years it decreases a little and other years up a little, but as a rule it has been in-

(Testimony of James H. Owen.)

creasing. I would not want to go on record as saying that it increased during those years. I am not positive, but I should say that probably, offhand, it had increased since 1905. I should say that the conditions in the building market in regard to building supplies, labor and the like, were different in 1907 from what they had been in 1905.

Looking at the floor plans of my contract and the floor plans of the Boggs contract, and comparing same, in Mr. Boggs' [223] contract I find at one end of the mess-hall what is marked "Employees' Mess-Hall, 18 feet x 22 feet," and adjoining it at that end, what is marked "China Closet 14 feet x 18 feet" and that those two rooms have been left out in my plans. This involved leaving out in my construction a wall across the mess-hall for the two rooms I have indicated and the partition wall between those two rooms, and leaving out also a fireplace between the main mess-hall and the employees' mess-hall, and as specified there, a fireplace between the employees' mess-hall and the china closet. Those were left out in my plans. Consequently there was no chimney put in by myself at that point—not at that particular place. That would have left the chimney in the middle of the floor. The whole of the front of the building was planned under my contract as a long mess-hall without any partition and without any fireplaces, and the fireplace which I observed at the other end of the mess-hall in Mr. Boggs' plans was also omitted in mine. The chimney was included but not the fireplace.

(Testimony of James H. Owen.)

Immediately to the rear of the mess-hall in Mr. Boggs' plans I find a corridor 8 feet x 40 feet 4 inches. I don't find any such corridor here in my plans.

Still looking at Mr. Boggs' floor plan, I find there immediately in the rear of the corridor a kitchen and an employees' kitchen. I find between the corridor on Mr. Boggs' plan and those two kitchens which adjoin the corridor, a partition wall, and between the two kitchens another kitchen wall with a place for the stove and three flues between those two kitchens. Also in the rear of the employees' kitchen a refrigerator 15 feet 3 inches one way by 14 feet the other way. Where the corridor is specified in Mr. Boggs' plan, a china closet is planned 12 feet x 14, adjoining the large mess-hall, and a storeroom 14x17, adjoining and at the back of the china [224] closet and in the rear of that storeroom a lobby 14' 6" x 10' with a jog in it reducing it on one end to 6 feet, and adjoining that a refrigerator 4x10. Now, on my plan I find the kitchen adjoining the china closet, the storeroom and the lobby just referred to, and running to the mess-hall and opening directly into it 22 feet wide by 36 feet 10 inches deep. Those rooms to which my attention has just been called occupy the space to which my attention was called just before on Mr. Boggs' plan. In my plan the refrigerator is 4' x 10' and in Mr. Boggs' plan 15 feet 3 inches by 14 feet. In my plan the partition between the two kitchens and the corridor has been omitted. The employees' kitchen has been

(Testimony of James H. Owen.)

entirely omitted in my plan at that point, and in place of that there appears in my plan a china closet and a storeroom. That part of the building is all re-arranged in my construction from what it was in Mr. Boggs'.

As to the pantries I have two pantries 8 feet wide by 10 feet 9 long, and Mr. Boggs has one five by 16 feet. One plan is arranged for two pantries and one for one. I have in mine a partition wall between the two pantries which is not in his. In Mr. Boggs' plan there is a drying-room and laundry, bakery and an ironing-room; in my plan covering the corresponding space an employees' mess-hall, an employees' kitchen and bakery. That is all. There is no laundry or drying-room on my plan. There was none constructed in my building. There is no ironing-room in my building as there is in Mr. Boggs' building. The only room which remained identical in character in the rear part of the building was the bakery. The outside dimensions of both of the rear buildings were both the same. In Mr. Boggs' contract it called for a laundry. It was divided up into a laundry, drying-room, bakery and ironing-room. Under the new plan wick I erected that same space was divided into employees' [225] mess and employees' kitchen and bakery. In Mr. Boggs' plan they have a partition dividing the laundry and the drying-room, and in the plan that I erected that is all in one room, without any partition. But the other side is just the same. As they took out that partition they had to strengthen the roof and put

(Testimony of James H. Owen.)

in girders and triple ceiling joists. Washtubs are called for in the laundry in Mr. Boggs' plan, and there is no laundry in my plan at all, no wash-tubs. In Mr. Boggs' plan, in the laundry and in the drying-room there are three ventilators. My plan only shows one in my building. In Mr. Boggs' building there are four ceiling ventilators and one roof ventilator in mine. In the ironing-room and the bakery in Mr. Boggs' plan there appear two ceiling ventilators. My plans show four ceiling registers. My plan shows triple ceiling joists with 4x8 purlins. There is a concrete hearth in my plan and there is none shown in Mr. Boggs' plan. In Mr. Boggs' plan for the bakery there is a place for a dough trough and a place for a kneading table. There is no such thing in that space in my plans, nor anywhere. In mine there are triple ceiling joists, 4x8 purlins and posts supporting the roof. None are shown on Mr. Boggs' plan. The same applies to the space called bakery in Mr. Boggs' plan, and employees' kitchen in my plan.

Looking at the front elevation in Mr. Boggs' plan there is a space for an iron rod about halfway up the chimney on one end of the building. There is no rod on mine at all. At the other end of that building I observe the chimney on my plan which does not appear at all on Mr. Boggs' plan. I observe differences in the front arrangement for the windows. The plan I had for erection calls for eight swinging sash. In Mr. Boggs' plan it shows three windows. In my plan of the front elevation [226]

(Testimony of James H. Owen.)

white stone is to be used according to that plan for the foundation; all through that front elevation. There is no such specification on Mr. Boggs' plan. The malapai stone applies to the foundation on my plan; that does not apply to Boggs' plan. Looking at the side elevation in my plan and in Mr. Boggs's, on my plan there appear to be six roof ventilators, and on Boggs' plan three. Three on his and six on mine. There are changes in the arrangement of the windows on that side elevation. Those two windows in this part of the building are closer together than these two. That is, at the side of the mess-hall they are closer together, in Boggs' plan than in mine. They are differently placed. These windows—two windows—in the center part are spaced a little differently; in the Boggs' plan I notice an outlet from the corridor to the steps and that does not appear at all in my plan. In place of that in my plan appears a closed wall with a window in it. The outside windows and doors to the refrigerator room are different on the two plans. That is made necessary by the fact that in my plan the refrigerator is very small and the other very large, and then there is an extra room in my plan.

Looking at the rear elevation, the roof ventilators are on a different side of the chimney in the two cases. In the rear elevation on my plan white stone is specified from the foundation to the roof: malapai stone is specified for the foundation. There is no such specification on Mr. Boggs' plan. In my con-

(Testimony of James H. Owen.)

struction I was to remove the old foundation and reconstruct it, taking the old foundation out altogether and reconstruct it. I found old foundations there when I went there. I am aware that those foundations were used by Mr. Boggs. His specifications called for him to use the present foundation by putting it in proper condition. I had to take all that out when [227] I constructed my work. The two contracts seem to be different in these respects.

And I made some exceptions in mine. Any part of a contract that I think I can't fulfill if I bid on it I make exceptions to it, and they noted exceptions in my contract. If I remember right, they called for good hard red brick, and sometimes inspectors send you a thousand miles away to get good hard brick, and I told them I would use the best brick obtainable in that vicinity. That was part of my contract. There is no such limitation in Mr. Boggs' contract. He was to use stone for chimneys. That is a difference between the two contracts. It would appear to me from reading this that I made some exceptions to their specifications in regard to the lumber. They might have specified pine, and I didn't want to furnish pine, or could not furnish it, or something like that. Just offhand I can't say where it was I made that exception. Sometimes I will make a dozen or fifteen exceptions to the specifications and say, "If you can't accept it, throw it out. There are some things I can't obtain."

My contracts are generally different from other

(Testimony of James H. Owen.)

contracts. When there is anything in them I can't do I tell them so. I won't stand for all they want. It seems I did not in this case. Mr. Boggs probably didn't make any exceptions. They specified plumbing here but haven't specified things. They have made it a little fuller here.

When I went down there there had been no construction work done whatever since Mr. Boggs ceased work. The foundation had been left as it was and some of the plumbing the pipes were torn out, and my impression is now, and in fact I know, the stone was piled up around the building. No construction work had been done whatever. The materials were lying on the ground [228] near there. There was no material right at the spot. It was piled back further away from the building—150 or 200 feet or something like that if I remember right.

Redirect Examination.

(By Mr. HORTON.)

When I gave my testimony that the difference was from three to five hundred dollars in the two contracts, I had in mind all of the differences that I testified about in cross-examination, between the two contracts. I had them in mind too, at the time I testified on direct examination that there were minor differences in the two structures. As a rule changes in spacing of windows don't cut any figure at all. In the majority of cases it wouldn't make any difference whatever whether you put the partition walls in one room or in another room—that is to say, the same class of materials.

(Testimony of James H. Owen.)

Recross-examination.

(By Mr. BOWEN.)

The foundations were not included in that three to five hundred dollar proposition whatever. The difference in the foundation is about one thousand to twelve hundred dollars. It is a fact that you have called my attention to the fact that Mr. Boggs had nothing to do with the foundation. Taking the foundations out and putting in foundations according to my contract would cost from seven to twelve hundred dollars. That is, the foundations alone. My bid of \$16,600 included that, but Mr. Boggs' contract didn't include it, as I understand it.

Redirect Examination.

(By Mr. HORTON.)

I took out the foundations because the Government ordered [229] them taken out. They were in poor condition and had to be replaced—ordered them taken out.

Cross-examination (Resumed).

(By Mr. BOWEN.)

Q. Isn't it a fact that there are more than 200 differences between the Boggs contract and your contract? A. More than \$200 difference?

Q. No; more than 200 differences between the plans and specifications under your contract and those under Mr. Boggs' contract?

A. I can't find a dollar's difference in the two plans.

Q. I am not asking you about the dollar's dif-

(Testimony of James H. Owen.)

ference. I am asking you about the items of difference in the construction.

A. I should say there is no difference in construction in dollars and cents.

WITNESS.—(Continuing.) In an interview between myself and Mr. Hopper after the last adjournment of Court at the Court-house, I would not say if I said there were more than two hundred items of difference between the construction as planned under my contract and as planned under Mr. Boggs' contract, but I said there were a great many items of difference. I might have said there were two hundred but I would not say positively I said two hundred. If I said two hundred there are probably two hundred there. I made the remark to Mr. Hopper at the same time that there were other differences to which my attention hadn't been called in cross-examination. As to telling offhand what the difference is in the two different buildings besides those I have already mentioned, why I can't tell that unless I took the plans and go straight through and tell you item for item. I don't remember which ones I referred to. There are so many little variations that it is hard to tell without the plans and specifications. Why it would take some time if you want them all. There are a great many [230] more than those I have spoken of already. A great many more items. Some in one plan and some in the other. I should say they prevail all through the construction.

**Testimony of Dr. J. S. Perkins [for Plaintiff]
Recalled.**

Dr. J. S. PERKINS, a witness recalled on behalf of plaintiff, identified the following exhibits, which were offered and introduced in evidence by counsel for plaintiff without objection.

United States Exhibit "BB."

Riverside, California, 5/20—1905.

Commissioner Indian Affairs,
Washington, D. C.

Sir:

I will build porch in front of mess-hall to building now being erected by me at Talklia, Arizona, for the sum of (#585#) five hundred & eighty-five dollars—same to be as per sketch enclosed and to conform to one now in front of Superintendent's office at Talklia.

I will also put in cement floors to bakery & laundry rooms of same building for the sum of (#151.00) one hundred & fifty-one dollars—allowance has been made for wood floor as per my contract.

Very respectfully yours,

A. W. BOGGS.

(Following is attached to the above.)

Riverside, California, 5/20—1905.

J. S. Perkins, Supt.,

My dear Sir:

Enclosed find tender for porch & cement work. As per your request I did not understand that I should send tender so soon to you. Awful glad to hear Mulford is getting along so [231] well. His

272 *The United States Fidelity etc. Co.*

work is the larger part and after he is through will not take long to finish. I wish Department would telegraph you in regard to the enclosed as 'twill cost me considerable more to have to ship my flooring later—on a/c local rates—

Weather fine here—in regard to grass seed when you buy allow one lb to the 100 feet.

With kind regards,

I am truly yours,

A. W. BOGGS.

Have ordered your lumber & sash.

United States Exhibit "CC."

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs.

Washington, July 31, 1905.

The Superintendent,

Rice Station School,

Talklai, Arizona.

Sir:

This office is in receipt of your letter of the 21st instant reporting eleven different items of the specifications for the rebuilding of the mess-hall at the Rice Station School, which have been glaringly disregarded by the contractor, Mr. A. W. Boggs. You will find enclosed herewith copy of letter from this office to Mr. Boggs, in which he is informed that this work cannot be accepted until it is properly erected in exact accordance with specifications. You should, in this case, notify Mr. Boggs, in writing, of every instance where he has varied from the specifications; in fact, as soon as any work is per-

formed in a way that tends to defraud the Government, you should immediately give him written notice of that fact and in all cases [232] refuse to accept such work until it is properly performed. This office must insist that all work upon the building be honestly performed and will stand behind you to see that the work in this case is done exactly as required by the specifications. It is desired to avoid all friction with contractors, so far as possible, but the work must be performed in accordance with specifications.

Yours respectfully,

C. F. LARRABEE,

Acting Commissioner.

(The following is attached to the above.)

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs.

Washington, July 31, 1905.

Mr. A. W. Boggs,

Riverside, California.

Sir:

This office is in receipt of the following report regarding the work now being performed by you upon the mess-hall in course of erection at the Rice Station School Talklai, Arizona, under contract of February 23, 1905, with the Indian Department.

"1" The specifications call for 4x12 and 2x12 wall plates.

He has used mostly 2x6.

"2" Specifications call for anchor bolts $\frac{5}{8}$ x33 every 8 ft.

No anchor bolts have been used.

"3" Specifications call for 2 purlins 6x3 in framework over dining room.

One purlin is used 4x8.

"4" Specifications call for $\frac{5}{8}$ ceiling and $\frac{7}{8}$ x4 wainscoting.

$\frac{3}{8}$ x6 wainscoting and $\frac{3}{8}$ ceiling are being used.

"5" Specifications call for bridging every 8 feet between joists.

This is being omitted.

"6" Specifications call for quarter-sawed flooring. Very little of the flooring is quarter-sawed.

"7" Specifications call for $1\frac{1}{2}$ flooring for stoops. He has put down $\frac{7}{8}$ stuff.

"8" Hearths are very poor and must come up.

"9" Specifications call for hip and valley rafters 2x10.

He used 2x8.

"10" Specifications call for floors mortised and tenoned wedged and glued.

He has on the ground dowelled doors.

"11" Window sash on the ground are not mortised, but are very cheap grade." [233]

Referring to the above charges in regard to the character of the work being performed by you at the Rice Station School, you are advised that the Superintendent of said School has been instructed to refuse to accept any of the work until it is performed in exact accordance with the specifications attached to your contract, upon which your bid should have been based. The Indian Office will not tolerate such substitutions as are evidenced in this building, and unless the work is properly erected as called for in

the specifications of your contract it will not be accepted.

Very respectfully,

Acting Commissioner.

United States Exhibit "DD."

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs.

Washington, August 12, 1905.

The Superintendent,
Rice Station, Arizona.

Sir:

This office is in receipt of your letter of the 2nd inst. recommending that the office force the contractor, A. W. Boggs, to take off all plaster in the Mess Hall and replace in a proper and decent manner; and also stating that the wainscoting should be removed and the wall plastered behind it as required by the specifications. You also request that he be forced to brace and properly truss the rear building, stating that there is a space of 44 feet without a brace of any kind, and that the ceiling is on.

In reply to the above you are advised that the same [234] course should be pursued in regard to these instances of improper work as you were instructed in letters of July 31, August 5 and 10, viz.: do not accept the building unless properly built, and notify the contractor, in writing, of every case where he has departed from the specifications. As soon as he says the building is completed notify this office immediately and if possible Supervisor John Charles

276 *The United States Fidelity etc. Co.*

will be sent to go over the work with you.

Very respectfully,

C. F. LARRABEE,

Acting Commissioner.

United States Exhibit "EE."

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs.

Washington, August 5, 1905.

The Superintendent,

Rice Station School,

Arizona.

Sir:

This office is in receipt of your letter of the 27 ultimo relative to the mess hall now being erected by Mr. A. W. Boggs at the Rice Station School and reporting a wide divergence from the plans and specifications. You request instructions as to whether you should take possession of the building and use it when the contractor says it is finished.

In reply you are advised that under no circumstances should you accept or use this building, or any part of it, by either direct or implied action, until it is completed *exactly* as required by the specifications. You should not issue vouchers to the contractor for any further work performed and when the [235] building is said to be completed you should notify this office immediately.

Very respectfully,

C. F. LARRABEE,

Acting Commissioner.

United States Exhibit "FF."

DEPARTMENT OF THE INTERIOR.

OFFICE OF INDIAN AFFAIRS.

Washington, October 27, 1905.

The Superintendent,

Rice Station School, Arizona.

Sir:

Inclosed please find copy of a letter of even date herewith, addressed to Mr. A. W. Boggs, contractor for the mess hall for the Rice Station School, in which he is told that in the reconstruction of said building he must follow exactly the plans and specifications of his contract. In case any more work is performed on this building which is not up to the specifications you should follow the methods already used by you, notifying Mr. Boggs of the discrepancies and at the same time informing this Office.

Very respectfully,

C. F. LARRABEE,

Acting Commissioner.

(The following is attached to the above.)

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs.

Washington, October 27, 1905.

Mr. A. W. Boggs,

Riverside, California.

Sir:

This is in confirmation of telegram to you dated the [236] 25th instant, as follows:

"Mess hall at Rice Station must be reconstructed in exact accordance with plans and specifications.

No variations will be permitted."

In your letter of the 17th instant to the Commissioner of Indian Affairs you ask permission to submit memoranda in reference to the mess hall at Rice Station, Arizona, and ask that a decision on the same be rendered. You state that the building was not erected in strict accordance with the plans and specifications but where any part was short additional work was performed to cover the deficiency and that you are now at Rice Station with men and materials on the way to tear down and make good any defects.

You state that you should not be required to stand an unnecessary loss of several thousand dollars and ask that the matter be carefully considered. You further state that the original plans call for an adobe building and that the details and specifications are for that class of building, but a note on page 2 allows the contractor to modify the details to suit stone construction, which you say was done in providing nailing strips for window and door frames; that you omitted laying in 1/6 strips but plugged the walls afterwards and secured your ground to same, a method which you say is used in all stone and brick construction but with adobe would not do as the adobe brick are too soft. The window and door frames you left out, leaving a recess and putting them in afterwards.

You state that the Superintendent now insists that you remove or tear down the entire building—nearly four thousand dollars work of stone work—simply to put in strips and frames as called for in the adobe specifications.

You claim that the roof is a No. 1 roof, the only fault [237] that could be found being in the purlins and construction of trusses; that you could not get the lumber called for, as the government mill furnishing you with lumber shut down; that you had great trouble in getting the sizes wanted but you substituted sufficient materials to more than offset changes in sizes; that you wish this roof to remain and that you are willing to allow whatever sum seems necessary to this Office, rather than remove it, for the reasons stated.

You ask that Supervisor Charles, or someone competent to judge, be sent to adjust matters.

In reply you are advised that this Office expects you to follow exactly the plans and specifications already furnished you for the reconstruction of this building. No departures will be allowed and unless the building is constructed exactly as specified it will not be accepted. A thorough inspection of this building has already been made by Supervisor Charles, who recommended that it be rejected, and it is plainly seen from his report that the building is unsafe and cannot be used for any purpose whatever.

If it is necessary to tear down the walls in order to make the building as it should be, this Office can give you no relief. The report on the roof is that it is unsafe and has already settled in one corner. Nothing, however, will be accepted but the building as required.

Very respectfully,

Acting Commissioner.

United States Exhibit "GG."**DEPARTMENT OF THE INTERIOR.**

Office of Indian Affairs.

Washington, October 30, 1905.

The Superintendent,
Rice Station School,
Arizona.

Sir:

This office is in receipt of your letter of the 21st instant enclosing letter from Mr. A. W. Boggs, contractor, for the mess hall at the Rice Station School, and in which he asks that you allow the walls and roof to remain as they now are. You state that there is not a bond in any of the partition walls where they meet the outside walls and that the mortar joints are as much as two or three inches thick.

In reply you are advised that a letter was sent to Mr. Boggs under date of the 27th instant, that the building must be erected as specified before it would be accepted and a copy of the letter was sent to you. This office can only repeat that the building must be as specified and if the walls are faulty they must come down. No inferior work will be accepted or substitutions permitted. The building must be exactly as this office contracted for, and if it is otherwise it will not be accepted. Please advise the contractor to this effect and also inform him that this office desires the building turned over to the Govern-

(Testimony of James S. Perkins.)

ment at as early a date as possible.

Very respectfully,

C. F. LARRABEE,

[239]

Acting Commissioner.

United States Exhibit "HH."

November 20, 1905.

Rice Station, Arizona.

To Commissioner Indian Affairs, Washn., D. C.

Contractor has taken no steps toward rebuilding.
Have heard nothing from him.

PERKINS, Supt.

United States Exhibit "II."

Rice Station, Arizona.

Nov. 22, 1905.

Commr. Indian Affairs.

Washington, D. C.

Contractor began reconstruction today.

PERKINS, Supt.

United States Exhibit "JJ."

Perkins, Supt.

San Carlos, Arizona.

Boggs matter before Department for instructions.
When received will communicate them to you.
Meanwhile be careful not to commit the Government
in any way.

Tel. sent on Dec. 1/05. [240]

WITNESS.—(Continuing.) I am the individual
referred to as Perkins, Superintendent, San Carlos,
Arizona, in the copy of the telegram just read. I
received that telegram from the Commissioner of
Indian Affairs, and afterwards acknowledged re-

(Testimony of James S. Perkins.)

ceipt of it. I recollect receiving that particular telegram. I do not remember the date when I received it.

Counsel then offered, introduced and read in evidence without objection, as United States Exhibit "KK," a letter of the Department of the Interior, Office of Indian Affairs, dated Washington, December 19th, 1905, addressed—

"The Superintendent of Rice Station, School, Arizona," and signed—

"F. E. Leupp, Commissioner."

United States Exhibit "KK."

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs.

Washington, December 19, 1905.

The Superintendent,

Rice Station School, Arizona.

Sir:

Referring to contract of Augustus W. Boggs of Riverside, California, with this Department, approved March 27, 1905, for the erection of a stone mess hall at the Rice Station School, which building was rejected by this office when offered and afterwards, on November 4th, destroyed by fire, you are advised that the office on November 28th referred the matter to the Department for decision. Under date of the 16th inst. the Assistant Attorney General for the Interior Department, rendered a decision, approved by the Secretary of the Interior, that under [241] the circumstances of the case Contractor Boggs should not be allowed to continue the work.

(Testimony of James S. Perkins.)

He says that inasmuch as it appears there had been a complete failure on the part of the contractor to comply with his contract before the building was destroyed by fire, . . . there is no good reason, either legal or sentimental, why the Government should permit him to replace the building. He states that Boggs should be expelled from the reservation and suit at once instituted upon his bond for the recovery of the money already paid him.

You are therefore directed to notify Augustus W. Boggs and his representatives, in writing, to vacate the premises, and in the event of his or their failure to go at once, to call upon the United States Indian Agent at San Carlos Agency to expel him or them.

See to it that the material and site remain intact, and that nothing is disturbed or removed therefrom until further orders from the Department. Report action taken under this.

Very respectfully,

F. E. LEUPP,

Commissioner.

WITNESS.—(Continuing.) Before writing the letter on file as Defendants' Exhibit No. 3, dated December 28th, 1905, I received the letter, United States Exhibit "KK," just read, and went over to San Carlos, agency.

Cross-examination.

(By Mr. BOWEN.)

The instructions given me by the Department which are in evidence, were carried out. I tried to carry them out in every case. When these letters instructed me to notify Mr. Boggs of anything, I

(Testimony of James S. Perkins.)

think I did so. Yes, sir. The letter of December [242] 19th instructing me to stop the work and have Mr. Boggs and his agents leave the reservation was received about four or five days later—that is about the 23d or 24th of December. Between that date and December 28th, Mr. Hopper was about the place. I don't think I said anything to him as to my instructions from the Department during those four days, until I gave it to him in writing, nor to anybody else—I don't know of anybody else. Mr. Hopper was proceeding with the work of reconstruction all that time from November 22d up to the 28th of December.

Testimony of Augustus W. Boggs, one of the Defendants.

AUGUSTUS W. BOGGS, one of the defendants, called on behalf of defendants, testified as follows:

Direct Examination.

(By Mr. BOWEN.)

I am the defendant contractor in this case. After the first of September, 1905, in reference to rebuilding the building, I began to remove the frames and wainscoting, the flooring, preparatory to putting the thing in condition. I began that work in September—I couldn't tell you exactly—about the middle of September, I think. Somewhere between the 15th and 16th of September. I was down there about the 18th I think, or 19th. I had Mr. Hopper and Mr. Rowland on the premises to carry on the work. They had their men employed—I don't know their names. Mr. Hopper was in charge for me. I

(Testimony of Augustus W. Boggs.)

saw Dr. Perkins there at that time and had a conversation with him.

(By Mr. BOWEN.)

Q. What was the substance of that conversation with reference to the building?

A. I simply told him I was there ready and was working [243] on the proposition to put it in condition as called for by the specifications.

Q. What did he say in reply?

A. He says, "All right. Nothing else but the specifications and the plans would be received." That ended our conversation.

Q. Did he authorize you to go ahead with the reconstruction of the work? A. Yes.

Mr. HORTON.—I object to that question. That is a question of authority.

The COURT.—Just let him state what was said.

Q. (By Mr. BOWEN.) State anything else that was said between you.

A. That was about all. I didn't stay in the office more than five minutes.

Q. You talked about the reconstruction work at that time?

A. Yes, sir; that was all. He simply stated nothing would be received only according to the plans and specifications.

Q. Did you tell him what your intentions were in that regard? A. Yes, sir.

Q. What did you say to him?

A. "That is all right."

Q. (By the COURT.) What did you tell him

(Testimony of Augustus W. Boggs.)

that you intended to do and were down there for?

A. To reconstruct the building, place it in condition in exact accordance with the plans and specifications.

WITNESS.—(Continuing.) That work continued until it burned on November 4th. [244] I was not there when the building burned. After the building burned the first thing I did was getting the adjustment of the fire. I couldn't do anything toward rebuilding until I did. As soon as that was done I bought material, hired men and tore down the building and cleaned the stone. I think it took probably about three weeks—probably four—to get the adjustment with the first insurance company.

As soon as the thing was adjusted with the fire insurance company, I proceeded with the work. I never received any notice prior to the 28th of December from the Government or from Dr. Perkins requiring me to stop work. After the fire as to the reconstruction of the building, the first thing the walls were taken down and cleaned—that took some considerable time. I believe a hundred and some odd feet long. I was not there at the time. Mr. Hopper was in charge for me. I didn't see that portion of the reconstruction myself—only time reports. My instruction to Mr. Hopper was to go ahead and put up the building according to the plans and specifications. I am familiar with the material that was on the ground at the time the notice of December 28th was sent to me. I tore down the stone that was remaining and cleaned them, cleaned up the

(Testimony of Augustus W. Boggs.)

premises, ordered my materials—it arrived there, delivered it on the ground, and the Government took possession of it, and never returned it to me nor the value thereof.

Mr. Hopper was in charge of the work after the fire. Mr. Rollins was on the job, and other men were there—I don't know who they were—he had hired. Ordinary workmen, laborers.

Cross-examination.

(By Mr. HORTON.)

I received word on September 12th, I think, that the building I put up down there was rejected by the Government. It [245] may have been later than that, but that is my memory. Prior to that time I knew that there had been numerous complaints as to alleged defects in the construction that was being put up by me. I did not receive notice of those defects from time to time as they were occurring in the course of the construction. I remember receiving a list of twenty-eight items after the rejection but not before. I acknowledged receipt of the list of items in a letter. Those letters reached me in due course of mail. After rejection I went to work and removed the defects that were called to my attention. I did nothing prior to the time the building had been rejected, the building had been rejected by the Government, towards putting it into shape. It was my idea that I would let the Government call for whatever changes were necessary, and then proceed to make those changes after rejection ensued. What I offered to do then was to put the

(Testimony of Augustus W. Boggs.)

structure after rejection so it would comply with the plans and specifications. It did not so comply prior to that time.

I had several conversations with Mr. Kincaid, before he went down as foreman to Rice Station, relative to the work that he was to do down at Rice Station. That was the only subject we talked about. I only gave him one drawings of the cap of the wainscot. The other drawings were down there waiting for him. I never gave him a drawing that was different from the plans and specifications. I may have given him a sketch on a piece of paper of certain trusses called for in the plans and specifications, as we were talking, explaining things, that is all. I explained how I wanted it done. I don't know how many such little sketches I gave him—probably one, maybe two. I do not know that I gave him two. I don't remember it. I do remember distinctly that I gave him one as to the wainscoting and capping. I did not give him one about the floor plan. The floor plan was down there. I didn't give him a separate drawing of my own as [246] to the floor plan. I couldn't do that. I gave him also a foundation plan which is now shown to me. I gave him besides that, I am satisfied, one of the wainscot and capping. I have no memory of having given him one as to the trusses that were to be put into the roof, indicating how I wanted the roof built. I don't think I did so. It is not possible that I may not remember it, because he had the drawings down there. I may have given him a free hand sketch

(Testimony of Augustus W. Boggs.)
of it. No plan. No detail. I know as a matter of fact, that the roof truss work that was done down there on the building did not comply with the plans and specifications. That was not according to my orders.

Mr. Kincaid went down there and did it on his own responsibility. It was my idea that Mr. Kincaid should follow the plans and specifications of the Government as to the roof as near as he possibly could on account of the size of the chimneys. The material that he worked down there with was such material as I had furnished him. Whatever was there I had gotten from the Government. I had bought it on my own order. It is not true that the Government filled my order just as it would fill anybody else's order. The Government did not give me what I asked for. I found that out at the time it was being delivered. I couldn't send it back. They could not replace it. I made an effort to get it from other sources and could not obtain it. I could not obtain what was called for in the plans and specifications. I did not take the matter up with the Indian office. I went ahead and used it anyway. It is not true that I did not notify anybody about it. I knew all the time that it did not fill the plans and specifications and details called for as to size.

(Plan offered and introduced in evidence as United States Exhibit "LL" without objection.) [247]

WITNESS.—(Continuing.) I had made no offer to put the building into shape until after the 1st of September. After the building had been rejected

(Testimony of Augustus W. Boggs.)

I went to work to put it into proper shape. I had a sufficient number of men there but I don't know how many it was. Eight or ten. I only know the amount of money that I paid for their labor. I don't know whether they did any work or not. I know that there were eight or ten men, but only from what I have been told. I have a pretty good idea of how much work was accomplished before the fire. I was not there personally. After the building was rejected by the Government, I undertook to have the Department of the Interior, particularly its Indian Office, comply with the specifications as I understood them. It is not true that I wanted some changes made. I undertook to have the Department accept the building as it stood there, so far as the roof was concerned, and also so far as the walls were concerned. I did desire some changes in those particulars from the plans and specifications, prior to the rejection. That was also after the rejection in reference to the walls, yes, but not to the other. The fire took place November 4th. I received a final decision from the Department that no modifications would be permitted, but I can't answer as to the date. After the fire I took down the stone walls, cleaned stone, cleaned out the pipes underground, took them up. I continued the work that I began before the fire. That was simply to relieve me of the necessity of tearing down the wall. When the fire came along I had to tear down the wall—what was left. Tear it down and clean it up. It was my intention to do whatever tearing down was necessary anyway, before the fire came. It is not

(Testimony of Augustus W. Boggs.)

true that these men simply continued to do the work that they had begun before the fire, taking it up where the fire left off. [248] The fact is that I simply took down the walls and cleaned the stone. I got the stone in the neighborhood there on Government land. The stone was furnished free. All I had to do was to go out and quarry it and bring it in and lay it. The entire stone structure was left there after the fire.

I don't know how many perches were there—I never figured it up. This stone was worth about \$4.50 per foot. The written notice by which I was excluded from the reservation was dated December 28th, 1905. After the fire my foreman employed men. He had authority to employ men. All that he could use—all that he could get. I bought some lumber, all the material necessary for the construction of the building. That arrived there on December 25th, or the day after or the day before. About Christmas time was when the material arrived. It may have been 24 or 28 hours before or after Christmas, but it was about that time. We unloaded—finished unloading the cars, the 28th, I think; the day prior to the seizure by the Government. I never negotiated with the Government or anybody in their behalf to get back that stuff that was taken. I never made any demand upon the Government to return it to me. I never undertook to be remunerated for the cost or reasonable value of the material.

After the fire I shipped down to Rice Station joists, and shingles and roofing, all the framing lum-

(Testimony of William Mulford.)

ber—not the flooring or the wainscoting or finish lumber. But the rough lumber.

Testimony of William Mulford [for Defendants].

WILLIAM MULFORD, a witness called on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BOWEN.)

My business in 1905 was contracting. I had been in that business since 1885 and was familiar with stone construction. [249] I have had about twenty years' experience in that direction prior to 1905. I was in charge of the stone construction work in the building in question here under Mr. Boggs. I went to work there on the 12th day of April, 1905, and left on the 6th day of July, 1905. When I first went there the foundation had been built there and the building burnt off from it, and there was some brick laying around the work and burnt material to be cleaned up before the work could commence. I had the work cleaned up, the sewer-pipes taken out, some iron work gathered up. I arrived there on the 12th and went to San Carlos on the 13th and I went back on the 13th again and then went to the stone quarry. I went to San Carlos in company with Dr. Perkins. I made arrangements there with the Government to furnish lumber for the job. I went there and was introduced to Capt. Kelley who was then in charge of the San Carlos Reservation in the sawmill, to make arrangements and contract for Mr. Boggs' lumber that he was to use in the building, by orders

(Testimony of William Mulford.)

of Mr. Boggs. Dr. J. S. Perkins took me there and introduced me to Capt. Kelley.

We then went back and I was taken to the stone quarry where I was to get stone from. That was about two miles and a half northwest from the school on the Government reservation. That is, from the place where this building was to be built. Then the next day I took men out there, commenced to get out stone and also set them to work at the building of the foundation for the new construction. I did nothing in reference to building the foundation—only to do some little patching up on it. The foundation was already there. We worked every day except Sunday with as beig as force as we could possibly work, getting out stone and hauling it to the job and putting it in the building; building limekilns, burning lime and hauling sand. I had [250] to quarry the stone in order to get it, at a point two and a half miles from the building, and then had to haul it to the building,

The particular work I had charge of was stone work and plastering. In fact, I was sent there as Mr. Boggs's representative over the entire work, but I had a special contract with him to do the mason work on the job. The mason work included the building of the stone walls and the plastering, the concrete work; the outside walls and the partition walls, and the plastering of the building, the brick hearths or concrete hearths that were to go in, the chimneys and fireplaces.

Refreshing my recollection by looking at the time

(Testimony of William Mulford.)

book which I kept in my handwriting during the time I was there, I would say that by the 30th of June, 1905, the walls were entirely finished—that is, the stone walls—the outside walls and all stone walls in the building, inside and out. The roof was entirely constructed and sheeted and 31,000 shingles were laid on the roof. The joists were all in with the exception of a few in the laundry which I was asked to leave out.

Dr. Perkins and myself and Mr. Boggs were in communication over a cement floor to be put in that room and leave the wood construction out, and until that was determined I was asked by Dr. Perkins to leave those joists up—the ceiling and the floor joists were all in with the exception I have just *mention*—by the 30th of June. By that time there was 800 yards of plastering done, and all of the roughing in of the plumbing was in, or nearly all of it—I won't say all of it, but nearly all of it was roughed in. I think there were about 150 yards of plastering yet to white-coat; but it was all rough; it was all plastered with the first coat. That white-coat was in the laundry and a portion of it was in the ironing-room, and all the rest of the plastering [251] was in. I would think that in the neighborhood of two-thirds of the shingling remained to be done at that time. About one-third of it on the roof and the rest of it was on the gables. By that time there had been some few window-frames in and some floor laid. Some floor laid I think between the corridors, in the corridors. And the grounds for all of the

(Testimony of William Mulford.)

wainscoting was in; the gasketing was all done, and I believe they had started the ceiling, to put the ceiling on, but there was very little on. The roof work was done except the shingling. The paper was all on the roof. The rafters and purlins were all in. The wall-plates—all those things were in. There was some little work had been done on the ice-box—that is, the refrigerator.

After the 30th of June I stayed there to the 6th day of July and left on that day. Up to that time the ordinary work went on just the same as before—putting on shingles, making of window-frames, and getting out materials and getting lumber to make up and dress up to put in the building, and I think there were men cutting wainscoting ready to be put on. All that time the various parts of the work as it progressed was in plain sight to anyone coming about the building. There was no part of the construction that was concealed from sight while it was being constructed. I saw Dr. Perkins about the building during the time I was there. I saw him there quite often. I saw him there every day. Well, there may have been a day or so, but I think almost every day. There was one or two days I think the Doctor went to Globe. The building where he lived was about 150 or 200 yards from the building that was being constructed. Dr. Perkins would stay ordinarily about the building when he came all the way from two minutes to an hour, hour and a half. He would talk about the building and the construction and various [252] things. He examined

(Testimony of William Mulford.)

the building. I took it for granted he was examining the building. He was looking at the different parts and commenting on them. He looked at the construction work as it went along. He would say that the job was a very good job. That this man was an artist, and that man was a mechanic and that the work was a credit to the craft. He referred more particularly to the stone work, and to a man by the name of Lamar. He said that he was certainly an artist and was a mechanic. At one particular time he brought Mr. Smith and introduced him to me as the inspector of the work. That was prior to June 30th, 1905. Dr. Perkins and myself looked at the work together numerous times. He and I discussed the progress of the work and the character of it a great many times. He asked me to leave out work and put in different work than what the specifications and plans called for. I saw Mr. Smith about there daily, during the whole of the time, I think, that I was there. He was engineer for the school, and was, I consider it, my inspector. When he came about the building he looked at the different parts of the work, commented on them in about the same strain as Dr. Perkins did. I had conversations with him about the progress of the work and the character of the work. The principal subject was in making out an estimate on the 27th and 28th day of June. With reference to making out that estimate, when I mentioned the fact to the Doctor that I had instructions to make out an estimate for Mr. Boggs, he told me to make out the estimate as near as I

(Testimony of William Mulford.)

could and then Mr. Smith and we would go over the thing and check it up together. So I made out what I considered an estimate, and then I called on Mr. Smith and we went over it together, and there was some little changes made in the estimate but they were arrived at on the 28th of June. We looked over the different parts of the work in the [253] building together—that is Dr. Perkins, Mr. Smith and myself together—yes, sir, the last day—the Doctor was not with me the first day. Mr. Smith asked me, in making this examination, how many feet of lumber was here, and how much stone work was done, how much it was worth, how much pipework or ironwork and what it was *work*, how much plastering and a question on pretty nearly everything that was itemized for that estimate. Dr. Perkins was present and he participated in that conversation.

I think in the plastering Mr. Smith gave me fifty yards more than I had estimated, and we took that. I don't know whether he measured up the plastering himself—I don't think he did. I think he took my figures for it, my estimates. He examined the stone work with Dr. Perkins and myself. They made a general inspection of the whole work, and it was on that inspection that the certificate involved here of June 30th, 1905, was made.

I know Mr. Carroll. He was the carpenter at the Indian School at that time. I saw him about the building. The first part he was there every day for two or three weeks after the work commenced on

(Testimony of William Mulford.)

the job. He was first appointed inspector of the work. At that time he inspected the work until Mr. Smith came. I can't name the date but I think about three weeks after the work commenced up until perhaps a little after the first of June. We commenced laying stone I think about the 17th of May. It took about a month or five weeks to get the stone out of the quarry and burn the lime. We started to put some new joists into the building when he quit. The walls we made was only partially started. Mr. Carroll was there every day on the work until up to that time. After that time he was there on the work—I seen him around the building perhaps—oh, I didn't pay any attention to it. Probably once a day on an average all the while the work was going on until I left. [254]

A man by the name of Saylers, Mr. Carroll and myself put in the joists. That is, the joists in the mess-hall proper. That is, the floor joists. Mr. Carroll had a hand in that. Mr. Carroll was going to go to work for Mr. Boggs, but Dr. Perkins told him he could not hold two jobs and he quit and stayed with the Government. He started to work as a carpenter by the day. He was inspector because he was not working on the job all the time. He did not work there more than a day or two before he quit—before he was taken away.

Cross-examination.

(By Mr. HORTON.)

I was practically through on the quarry between June 10th and June 17th. I commenced laying

(Testimony of William Mulford.)

stone of the 8th day of May. My contract with Mr. Boggs was to do all the mason work, stone work, plastering, chimneys, building fireplaces and hearths. I was to do anything that required any masonry to be done in and about that particular building. I was in reality the sole representative of Mr. Boggs down there for every purpose up to the 6th of July, for all the work. At that time I was through and Mr. Boggs released me—said I could come home and leave the work with Mr. Kincaid. I do not know, of my own knowledge, whether Dr. Perkins had any right to represent the United States Government there. As to whether Mr. Carroll had a commission from the United States Government to do any work down there in connection with that building, I only know of my own knowledge that he worked by the orders of Dr. Perkins. I don't know whether Dr. Perkins had any authority to request him to do work in that connection or other kind of work there. The same is true as to Mr. Smith. I don't know what his authority was, or if he had any, to represent the United States Government in that particular work.

I stated in my direct examination [255] that as to Defendants' Exhibit "I" and "II" for identification, it was myself who furnished the items for the most part that make up those statements.

Mr. Boggs wanted to get some money and I proceeded to make up some estimates of the work in place. I was working for Mr. Boggs. Mr. Boggs had already paid me the biggest part of my money. I first made up an itemized list on my own account

(Testimony of William Mulford.)

and then submitted it to Mr. Perkins. That is true as to both exhibits I and II for identification, being estimates of May 23d and June 30th, 1905. As to the last one, that was on the 27th or 28th of June, 1905. The first one was thirty days prior to that. I also had Mr. Smith with me when I was going over it the second time. I don't think Dr. Perkins was along all the time with Mr. Smith until after Mr. Smith and I had gone over it. Dr. Perkins was depending upon Mr. Smith. I took it that I was talking to Mr. Smith; yes, sir. I did not, to any extent whatever, in making up this statement, include the lumber that was on the ground. I considered none of the lumber that was upon the ground as entitling me to any money, but only the lumber that was in place. I think the first estimate is in error there to the best of my belief; I don't think there was that much lumber in the building there at that time. I think those figures practically included some of the lumber on the ground. All of the work that was done except the roughing in of the plumbing was in the open and not concealed during the progress of construction. I don't think there was any bridging put in when I left. There was no floor laid, only in the corridor, that I remember of. It was not bridged in there. It was not long enough span to bridge.

In the stonework I used the plans and specifications in carrying out the work. I did not follow those plans and specifications. [256] I was in the employ of Mr. Boggs. I did not have orders for all

(Testimony of William Mulford.)

the changes from Mr. Boggs. I did not do any on my own responsibility. In employing me Mr. Boggs told me to follow the plans and specification but I did not do it because Dr. Perkins asked me not to do it. I followed the plans and specifications in all particulars except what Dr. Perkins told me not to do. I followed the plans and specifications with certain exceptions. I did not follow them in those cases because I was told not to by Mr. Boggs and Dr. Perkins. Mr. Boggs told me to make the walls the same height all around—that the plans and specifications called for one wall considerably higher than the other. That is one foot higher. Dr. Perkins did not have anything to do with that. Mr. Boggs gave me permission to change the work from rubble work to range work, rock spaced range work.

In building the outside walls I did not set the frames into the wall during the course of construction and build the masonry around it. I built it otherwise for perhaps various reasons. One was, we didn't have the frame, and another one was that it would be just as practicable to do it without them. The stone was very easily worked with axes or hatchets or anything of a cutting nature. I was under Mr. Boggs' instruction in that particular.

Redirect Examination.

Q. (By Mr. BOWEN.) These divergencies that you have been speaking of just now, were they apparent to the eye or not?

Ans. Oh, yes, yes, sir.

Q. The fact that the wall was not the same height

(Testimony of William Mulford.)

all around could be seen by anybody?

Ans. Yes, sir. [257]

Q. Do you know whether Dr. Perkins had a copy of the plans and specifications there?

Ans. Yes, sir, he did.

Q. You have seen him examining them, have you?

Ans. Yes, sir.

Q. During the month of June?

Ans. Yes, sir.

Recross-examination.

(By Mr. HORTON.)

Dr. Perkins did not say anything about the inspection that had to be made from Washington. I took it for granted there would be a final inspection of the work.

Testimony of Joshua R. Hopper [for Defendants].

JOSHUA R. HOPPER, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BOWEN.)

I am a carpenter by trade. I have been engaged in that business about thirty-three years. I worked on the building in question under Mr. Boggs. I went there about the 10th of July, 1905. I went there to work by the day for Mr. Boggs under the foreman who was there, to do carpenter work. I stayed there, I think till about the 15th or 18th of August, and left there at that time. I went back afterwards about the 14th of October I think, to about the 1st of January, 1906. At the time I first

(Testimony of Joshua R. Hopper.)

went there about the 10th of July, I think the building was all up as to the stone work, and the floors were all laid, excepting a little, the plastering was all completed except a little white-coating, the roof was practically on, that is as to the shingles. The shingles were pretty much all on. Inside work had progressed some little, I can't just call to mind how much, but they were [258] working I think on the inside when we went there. I think the sash was yet to be fitted, probably the doors to hang, some casings to put on, some of the wainscot to put on, and some of the ceiling to put on, and some work around the ice-box, refrigerator. Otherwise the building was finished.

Until I left in August I put on the ceiling, worked on the ice-box, made some kitchen tables, kneading troughs, dough troughs,—I don't remember just everything that I did do. I didn't put in any joists, or structural work anything of that kind. I did do a little bracing out on the roof; material that was used in the scaffolding, if I remember right, after the scaffold was taken down we did use that to brace up the roof in the rear part of the building. I saw Dr. Perkins about the place. I think he was there every day if I am not mistaken. He would be there passing back and forth during the day, and generally in the evening after we quit work the Doctor and Mr. Carroll, or the Doctor and Mr. Smith would be in and around the building, after we had gone out of the building.

I presume that he was inspecting the building,

(Testimony of Joshua R. Hopper.)

examining it; he was walking around looking at the construction. That was nearly every day. I saw Mr. Smith in there frequently doing the same thing. Mr. Carroll was walking around looking at it the same as the rest. I would say he was there every day if I am not mistaken. I finished my work on the first building somewhere about the 16th or 17th of August. I left about that time.

The building I think was completed at that time. The other workmen left at the same time. I went back to the building about the 14th of October. I was hired by Mr. Boggs to go back and put the building in shape to comply with the plans and *and* specifications. His instructions were to do it absolutely, [259] to conform absolutely with the plans and specifications. I think I had those plans and specifications with me. Mr. John Rowland was the carpenter with me on the work at that time. There were a couple of laborers also under me. From that time up to the 4th of November, we took up the floors, took out the sash, frames, took the doors off, took off the plastering. I think that is practically all, and we cut out some wainscoting. We had not finished what we were doing at the time the fire occurred. We were right in the midst of it. Dr. Perkins during that time was there around the building. He was there around the building every day, I think. He informed me a number of times during that time that it must be put up according to plans and specifications, it could not vary one iota. That is, between October 14th and the time

(Testimony of Joshua R. Hopper.)

of the fire.

The conversation I had with Mr. Perkins was that it was to conform absolutely with the plans and specifications. I think he gave me directions and made suggestions about the manner in which particular work should be done, as the work progressed along from time to time, yes. Of course, we hadn't commenced the reconstruction as yet. We were tearing down, getting ready for it.

When the fire took place on the 4th of November I immediately notified Mr. Boggs and I remained on the premises. I stayed there for further orders. When I got them I went to tearing down the walls, cleaning up. I think I have destroyed the letter of instructions I received from Mr. Boggs. The substance of my instructions was to go ahead and tear down and prepare for rebuilding the building, to clean up everything, and get everything in good shape. I think I communicated the substance of that to Dr. Perkins. Yes, sir. I don't think he objected. We were then getting ready to construct, you know. [260] We took down the walls, cleaned off the stone, and we took the sewer-pipe out at Dr. Perkins' directions, and cleaned it out, and we were preparing to take—he ordered me that we could not reconstruct on the old foundation, that we would have to tear out the foundation; that there had been a fire on it and damaged it some, and it would not do to rebuild again, and he ordered me to take that foundation out and relay it, and I was preparing for that, and then unloading the lumber as it came, get-

(Testimony of Joshua R. Hopper.)

ting lime and sand and so forth. After the fire I think Dr. Perkins was about the place about the same as he was prior. Around every day back and forth. After the fire he repeated his direction that it was to comply absolutely to the plans and specifications. I had conversations with him with reference to what the plans and specifications did require in particular kinds of work. One particular matter he said we must comply absolutely with the plans and specifications. I said it would be impracticable to do that. I said, those plans and specifications call for an adobe building. They call for wood sills and wood caps, and he would not want to put those onto a stone building. That was before the fire.

I did not have such a conversation with him after the fire. Dr. Perkins said he was satisfied with our work in tearing down and getting ready to reconstruct. I don't think he ever indicated his dissent from what we were doing while I was there. On the evening of the 29th of December he served on me a written notice which he referred to in his testimony, to leave the reservation. I was in charge there for Mr. Boggs. I was endeavoring to cover up some lime to keep the weather off of it and the notice was handed to me by an Indian, if I remember right and I kept on covering up the lime until I got it covered up. I was putting it on a platform preparing to keep it off the [261] ground, and I had a load of finish lumber lying out doors, and Mr. Perkins had permitted us to have the finish lumber put in the barn, to keep it from the weather. And I

(Testimony of Joshua R. Hopper.)

went down to where Dr. Perkins was at his house in the rear, where he was building a chicken-coop, and asked him for the key to get into the barn to put the other load of finish lumber in. He said, "Well, we will take care of the finish lumber. *You* see by your notice that you are ordered off the reservation." I said, "Well, Mr. Perkins," I said, "I have some debts on the reservation and I would like to clear them up before I go." I asked him for permission to stay and he said to "go ahead and do up your business. I can't tell you to stay, but go ahead and do your work and then go." I undertook to do that. That was on Friday evening and I stayed until Sunday evening. Dr. Perkins did not in the meantime personally demand that I leave. He sent the marshal from San Carlos up Sunday at noon. He agreed I should finish up my business and go Monday morning. I left Sunday evening. It was about the last of December—the 31st of December. Friday was the 29th day on which I got this notice. At that time there was material on the ground belonging to Mr. Boggs. Those materials arrived there some time in the latter part of December, from the 20th to the 28th, somewhere in there. They were unloaded from the railroad and put on the premises that we are talking about, somewhere along from the 24th to the 28th I think. I saw the material there myself, and checked over the bills.

Cross-examination.

(By Mr. HORTON.)

As to whether I am very friendly towards the de-

(Testimony of Joshua R. Hopper.)

fendant Boggs I will say not particularly so; no, sir. Not more than I meet him on the street and speak to him—that is all. As to [262] whether I desire that any judgment that may be entered against him be as little as possible, I will say why, just what is right. I am not particularly interested in the outcome; no, sir. I never at any time made any statement to Mr. Owen that I was here to make my estimates high so I could help Mr. Boggs out. I arrived at Rice Station the first time about the 8th or 10th of July, 1905. Mr. Boggs sent me down there to help Mr. Kincaid. I worked under instructions of Mr. Kincaid. When we went to construct the ice-box Mr. Kincaid consulted plans and specifications. All the other work I did without reference to plans and specifications under instructions from Kincaid. I didn't know at that time whether our work complied with any plans and specifications. I worked there until about the middle of August, I think every day, and left about that time and came back to Los Angeles. I returned to Talklai on the 14th of October, I think.

Before I went down there the last time Boggs told me what he wanted me to do. He handed me a list of the discrepancies, I think. He said that the building had been rejected—that the Government would not have it: that I was to go down there and tear the building down and reconstruct it according to the plans. I understood I was to tear it down if it was necessary, to make such changes as were required to be made. If it required to be torn down

(Testimony of Joshua R. Hopper.)

we would: if not, not. I knew of my own knowledge that certain changes had to be made to comply with the plans and specifications. I don't think we had any conversation with regard to arranging so that the roof would not have to be touched. We had a conversation in regard to the plastering and wainscoting. I believe the plastering did not go clear down to the floor. When I got down there on the 14th of October, Mr. John Rolland, and a man by the name of Cox, were with me, and began to work when I got down there. I think the [263] first thing we did was to take the doors off the hinges. We did that because they would get bruised up in tearing off the wainscoting and ceiling. The wainscoting and ceiling had to come off. Mr. Boggs told me it had to come off. Everything I did down there was with a view to reconstructing the building, so that it would conform with the plans and specifications submitted by Mr. Boggs to me this last time. I never had seen those plans and specifications before Mr. Boggs furnished them to me this last time—not to look at them in detail, no, sir. On my return, on or about the 14th day of October, 1905, I began to do my work in accordance with the plans and specifications that the Government made at that time. Prior to that time I hadn't paid any attention to those plans and specifications. I had nothing to say prior to that. From the 14th of October till the 4th of November myself and the other two men proceeded to work around there. I don't think it was the intention to tear down the walls

(Testimony of Joshua R. Hopper.)

nor to remove the roof. We intended to leave the roof and the walls as they were. I think there was to be an agreement of some kind, if I am not mistaken. An agreement was talked of that the roof and walls were to be left. I think Mr. Boggs said that he would undertake the work of seeing if he could not get the Government to let the roof and walls stand.

I don't know what he did to bring that about. I think to be exact, it was the 17th of August that I left the first time, if I am not mistaken. There was nothing left to be done at that time so far as I know. I think the building was completed. Kincaid and myself left together at about the same time. He was my foreman at that time. When I returned afterwards I went down there in charge. I understood that Dr. Perkins had authority from Washington or from the United States Government to inspect the building. I believe I heard the Doctor say so— [264] that he was the inspector. I do not know anything about it only what he told me. I do not know whether the Government had him out there as inspector or not only from his own talk—that's all. I don't know whether Mr. Smith had any authority to be in and around the building only from Perkins telling me.

As to whether I am very eager to testify right now in the way I am doing, why it seems to me to be exactly right. As to whether I am eager to testify that way, I will say, not necessarily, I would not be if you would not ask me the questions. As

(Testimony of Joshua R. Hopper.)

to Carroll, I do not know of my own knowledge whether he had any authority to inspect the building on behalf of the Government; other than what Dr. Perkins said about it I don't know anything about it.

Testimony of John Rolland [for Defendants].

JOHN ROLLAND, a witness called on behalf of the defendants, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BOWEN.)

I was working at carpenter work in 1905. And that is still my business. I have been in that business about fifteen years. I was connected with the work that has been talked about here in helping to construct and finish the building. I went there July 14th, 1905. At that time the building was up, the walls were all up, the plastering was all on excepting some white coating, the shingles were about three-fourths on. The shinglers worked several days after I landed there. The chimneys were in. The inside finish remained to be done. That including the hanging of the sash, casing up, hanging doors, putting on wainscoting, and building the refrigerator. I remained there until the 17th day of August and left the morning of that day. [265]

It was supposed to be done. The construction work was supposed to be done at that time. I went back later on on the order of Mr. Boggs on the 9th day of October. I stayed there until the 18th of November. When I was there the first time I saw

(Testimony of John Rolland.)

Dr. Perkins about the place. He visited the work from time to time, I would say every day. He made an inspection or examination of the work—I think he did, yes, every time he was there. I saw Mr. Smith about the place. Mr. Smith was usually there in the evenings after we quit work. I know he was there, I seen him in the building—I couldn't say how often. I couldn't say as to every day. There were a number of times I seen him there in the evening, but I couldn't say as to being every day. I saw Mr. Carroll about. He was there about the building—I couldn't give the number of times—he was around there several times during the day; frequently dropped through, walked by and would go through. He was also there in the evenings. I got there on the 14th of July.

My testimony as to Dr. Perkins, Mr. Carroll and Mr. Smith applies right along from the time beginning with July 14th until I left. When I went back there in October I saw those same three persons about the work. All three of them. I did not have any conversation with them in regard to the work. I would say Dr. Perkins would spend from five minutes to thirty minutes at a time on the job. I can't say that he was there every day but he was there quite a number of times through the day after we went there the last time. I was not there after the fire. That is, I was not around the building after the fire. I left on the 18th of November. I have not been back there since. After I went there in October we took the floors up, took out the window

(Testimony of John Rolland.)

frames, took the doors off, took the door frames off, took the wainscoting off, and engaged in dressing [266] up flooring, preparing it to use for wainscoting, flooring that was down.

I did not myself have any directions from Mr. Boggs when I went down there at that time. I got my directions from Mr. Hopper. I was working every day from the time I got there except Sundays, and all day each day. Mr. Hopper and I were doing the carpenter work. He had some Indians picking off the plaster and pulling nails out of the floor. I couldn't say how many were working there altogether. I think there were two Indians, one tearing off plaster and one taking nails out of the flooring that was taken up. They all worked every day and all day except Sunday. When the fire came on we had the floors up, as I say, and the windows taken out, the window frames taken out, the doors taken off and the door jambs taken out, and the wainscoting off. The plastering was all off. The chimneys were down. We were in the midst of our work when the fire came. Dr. Perkins never made any objections to what we were doing at that time more than that we were to conform to the plans and specifications. I heard him say that, yes, sir.

Cross-examination.

(By Mr. HORTON.)

I couldn't say as to anything being done to tear down the roof—I never had any orders. I did not have any orders from Mr. Boggs or Mr. Hopper to take the walls down, that is, the stone walls them-

(Testimony of John Rolland.)

selves. I found the building when I got there on the 9th of October about the same as I left it on the 17th of July. Nobody was using the building—nobody was in it. It stood practically as I left it. There was dust on it and that sort of thing, but that was all. On the 9th of October I began to do some work with Hopper and Cox. I don't remember whether the Indians started on the 9th or not. I don't think [267] they did for a day or two afterwards. I couldn't say whether the Indians worked continuously because I didn't pay any attention. I was not interested in that part. Mr. Cox was there two or three days only, so that there were myself and Hopper and a couple of Indians up to the time when I left on the 18th of November.

I did not do any work at all after the fire. Mr. Hopper did not do any work after the fire while I was there. If he did anything it was after the 18th of November.

The following letter of August 10th, 1905, addressed to the Honorable Commissioner of Indian Affairs, Washington, D. C., was offered, introduced and read in evidence as Defendant's Exhibit No. 12.

Defendant's Exhibit No. 12.

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, August 10, 1905.

The Honorable The Commissioner of Indian Affairs,
Washington, D. C.

Sir:

Herewith I have the honor to forward more evi-

dence of the contractor's rascality in rebuilding the mess hall.

Very respectfully,

J. S. PERKINS,

Superintendent.

(1) Chimneys. Chimney between two dining rooms: specifications call for two flues, each to be nine inches square. Contractor has put in one flue, 6x8. The fireplace and flue are built against the wall after the wall was completed. The stones were not [268] bonded into the partition wall, but the partition makes one side of the flue.

(2) Chimney at south end of dining room is built same as above, all forming one side of flue, and not bonded. Where it comes out of roof it enlarges about four inches all around. Lacks at least four feet of going to top of roof and it is not stayed with an iron rod as shown in the plans.

(3) Chimney between the two kitchens as shown on the plans should be three flue chimney, each 9x9: This as built is a one flue chimney 8" x 28", no partitions.

(4) Chimney between laundry and ironing-room as shown on the plans should be two flues, 9" x 12" each. This is built as two flues, each 8" x 10", and the chimney before reaching the roof is carried over to one side about half its size, making it dangerous and a very irregular flue.

Chimneys No. 3 & 4: The parts outside of the roof are built of white stone cut in layers about 8 inches thick.

Nos. 1 & 2, and the bodies of *all* the chimneys are

laid of the same kind of stone, about 8 inches thick and 16 to 18 inches wide, and set on edge. The mortar of all is of pure quick-sand with only a trace of lime, and the mortar in *all* the chimneys can be easily and completely removed by shoving through an ordinary carpenter's rule, leaving great holes.

Chimney no. 3 is beginning to come to pieces.

None are plastered on the outside as required opposite the timbers and the framework is against all the chimneys. These chimneys are dangerous, and are liable to burn the building down when the first fire is built.

ROBERT A. SMITH, Engineer.

W. R. CARROLL, Carpenter. [269]

The following telegram dated September 29th, 1905, to the Commissioner of Indian Affairs from Perkins, superintendent, San Carlos, Arizona, offered, introduced and read in evidence as Defendant's Exhibit No. 13.

Defendant's Exhibit No. 13.

San Carlos, Ariz., Sept. 29, 1905.

Commr. Indian Affairs,

Washn. D. C.

Contractor says he will make good wants itemized list of discrepancies in Charles Reports wants to make more substitutions wants more time my demand for immediate delivery received your telegram twenty-three.

PERKINS, Supt.

The following letter from J. S. Perkins to A. W. Boggs dated September 29th, 1905, offered, introduced and read in evidence as Defendant's Exhibit No. 14.

Defendant's Exhibit No. 14.

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, Sept. 29, 1905.

A. W. Boggs, Riverside, California.

Sir:

I have received your letter of the 24th. In reply you are informed that the specifications of your contract should be your Bible in this matter, and any resort to substitution or other subterfuges will only serve to sink you deeper in your troubles. Your statement in regard to this porous rock not [270] taking plaster, and wanting to substitute, is foolish. You got that excuse from Mulford. You are the first person that has ever put up this excuse. The facts in the case are that the wall when properly built makes an excellent chance for plastering. Your plastering is of no value for several reasons: in the first place, the walls were exceedingly irregular, and in the next place, you used *quick sand* and *water* with only a very small portion of lime.

Your request to the Department that you be allowed more time is denied. You have had an abundance of time, plenty of help from me, and now I mean to collect \$20.00 per day from you for every day after September 1.

You are further informed that I do not want any more dancing-masters in charge of the construction of this building, but I want a mechanic and an honest man.

You are further informed that if you do any more work here you must furnish accommodation for yourself and all the men. We will not furnish lodging nor board. You are also informed that you must furnish them with all necessary tools, materials &c.

You are informed again that the building is rejected, and that you lay yourself liable to civil and criminal prosecution by the United States Government. Yours was a deliberate attempt to defraud the Government of the United States.

You are informed that I want that building torn down and put up in exact accordance with the specifications, and I want you to get busy.

In the name of *the name of* the Government of the United States I hereby demand that you deliver the Mess Hall to me immediately, and in exact accordance with the specifications of your contract, said contract being with the Commissioner of Indian Affairs upon the part of the United States, and dated [271] February 23, 1905, and approved by the Secretary of the Interior, March 27, 1905.

Very respectfully,
(Signed) J. S. PERKINS,
Superintendent.

I certify that the above and foregoing is a true copy of a letter sent to A. W. Boggs by me.

J. S. PERKINS,
Supt. & S. D. A.

The following telegram dated San Carlos, Arizona, October 11, 1905, from Dr. Perkins to the Commissioner of Indian Affairs offered, introduced and read in evidence as Defendant's Exhibit No. 15.

Defendant's Exhibit No. 15.

San Carlos, Ariz., Oct. 11, 1905.

Commr. Indian Affairs, Washn., D. C.

Contractor Boggs writes that he is sending men and material for reconstruction Mess Hall.

PERKINS, Supt.

The following letter of October 15, 1905, addressed by Dr. Perkins to the Commissioner of Indian Affairs, Washington, D. C., offered, introduced and read in evidence as Defendant's Exhibit No. 16.

Defendant's Exhibit No. 16.

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, Oct. 11, 1905.

The Honorable the Commissioner of Indian Affairs,
Washington, D. C. [272]

Sir:

For your information I have the honor to forward herewith a communication from A. W. Boggs, Contractor. Three men arrived today to begin work. I have told them that nothing would be tolerated but the erection of the building in exact accordance with the specifications; that I had no objections to their beginning work; that I had no orders from you to stop them, and if such orders were received they would be immediately notified.

Very respectfully,

J. S. PERKINS,

Superintendent.

The following letter from Dr. Perkins to A. W. Boggs, Riverside, Cal., dated October 19, 1905, offered, introduced and read in evidence as Defendant's Exhibit No. 17.

Defendant's Exhibit No. 17.

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,
Arizona, October 19, 1905.

A. W. Boggs,
Riverside, California.

Sir:

Under date of the 13th instant the Commissioner of Indian Affairs directs me to say to you that if you expect to reconstruct the Mess Hall and not make a few changes in the hope that it will be accepted, he is willing for you to do so. If, however, you expect that by covering up defects and making a building of fair appearance you can push your contract through, you are putting yourself to useless labor. He says that if you [273] erect the building as specified it may be accepted, but otherwise it must be rejected. He directs me to inform you of this fact, and also state to you that no halfway measures will be accepted by the Indian Office.

Very respectfully,

J. S. PERKINS,

Superintendent.

I certify that the above is a true copy of a letter sent to A. W. Boggs by me.

J. S. PERKINS,

Supt.

The following telegram from A. W. Boggs dated

October 25th, 1905, to Commissioner of Indian Affairs, Washington, D. C., offered, introduced and read in evidence as Defendant's Exhibit No. 18.

Defendant's Exhibit No. 18.

October 25, 1905.

Riverside, California,

To Comr. Ind. Affrs.

Washn., D. C.

Can I use quarter sawed Oregon pine flooring at Talkla instead of yellow pine answer my expense.

A. W. BOGGS.

The following letter from J. S. Perkins to the Commissioner of Indian Affairs at Washington, D. C., offered, introduced and read in evidence as Defendant's Exhibit No. 19:

Defendant's Exhibit No. 19.

DEPARTMENT OF THE INTERIOR,

United States Indian Service.

Rice Station School,

Talklai, Arizona, Oct. 21, 1905. [274]

The Honorable, the Commissioner of Indian Affairs, Washington, D. C.

Sir:

Mr. Boggs says he intends to use fire proof pulp plaster upon the Mess Hall. Does this quality of plaster meet with the approval of the Office?

Very respectfully,

J. S. PERKINS,

Superintendent.

The following letter from J. S. Perkins to the Commissioner of Indian Affairs, Washington, D. C., of-

ferred, introduced and read in evidence as Defendant's Exhibit No. 20.

Defendant's Exhibit No. 20.

DEPARTMENT OF THE INTERIOR.

United States Indian Service,

Rice Station School,

Talklai, Arizona, October 21, 1905,

*The Honorable the Commissioner of Indian Affairs,
Washington, D. C.*

Sir:

In yesterday's mail I sent you a copy of a letter sent by me to Mr. A. W. Boggs, contractor, in regard to reconstructing the Mess Hall. I have informed him that no half way measures would be accepted by your Office. He called on me to-day in sack cloth and ashes and told me that he had written to you in regard to the matter but had received no reply. I enclose herewith a note which he wrote me after leaving my office. I treated him politely and informed him that he must do his work in [275] exact accordance with the specifications. He is very anxious to get permission to allow the walls to stand and the roof to remain. I will state to you that there is not a bond in any of the partition walls where they meet the outside walls. Many of the mortar joints are as much as two and three inches thick. With the backing of your Office I will make him put the building up properly at an early date, and according to the contract. He appeared very contrite and meek and lowly in spirit, but I intend to make him get busy and give me the building in proper shape at as early a date as possible. He is

vs. The United States of America. 323

playing for time, thinking that you will give permission for the walls to stand, and also the roof.

Very respectfully,

J. S. PERKINS,

Superintendent.

The following letter from J. S. Perkins to the Commissioner of Indian Affairs, dated October 21, 1905, offered, introduced and read in evidence, together with a letter from J. S. Perkins to A. W. Boggs, dated October 28th, 1905, as Defendant's Exhibit No. 21;

Defendant's Exhibit No. 21.

Rice Station School,

Talklai, Arizona, Oct. 21, 1905.

The Honorable the Commissioner of Indian Affairs,
Washington, D. C.

Sir:

I have the honor to request that you forward to me Mr. Charles criticism upon the Mess Hall for my information and future guidance. I would like to have it at an early date.

Very respectfully,

J. S. PERKINS,

Superintendent. [276]

Rice Station School,

Talklai, Arizona, October 28, 1905.

A. W. Boggs,

Riverside, California.

Sir:

You are informed that your proposition to use pulp plaster upon the Mess Hall is not in accordance with the specifications and will therefore be rejected.

324 *The United States Fidelity etc. Co.*

You are further advised that no variations from the specifications will be permitted.

Very respectfully,

J. S. PERKINS,

Superintendent.

I certify that the above is a true and correct copy of a letter mailed by me on the 28th of October, 1905, addressed to A. W. Boggs, Riverside, California,

J. S. PERKINS,

Superintendent.

The following letter from J. S. Perkins to A. W. Boggs dated October 31st, 1905, offered, introduced and read in evidence as Defendant's Exhibit No. 22.

Defendant's Exhibit No. 22.

Rice Station School,
Talklai, Arizona, Oct. 31, 1905.

A. W. Boggs,

Riverside, California.

Sir:

In conversation with Mr. Hopper, your foreman, he informed me that you had written him that you had received the sample of yellow pine flooring sent you by me. Mr. Hopper says that you have secured something better. You are informed that I demand nothing better than matched yellow pine, quartered [277] sawed, $\frac{7}{8}$ " thick and not more than 4" wide. For your information, I will state that yellow pine is a product of the Southern States, the Southern Atlantic and Gulf States especially, and the lumber may be obtained in any quantity in the markets of

El Paso, San Antonio, Houston, New Orleans and other places.

Very respectfully,
J. S. PERKINS,
Superintendent.

I certify that the above is a true copy of a letter sent by me to A. W. Boggs,

J. S. PERKINS,
Supt. & S. D. A.

The following letter of January 2d, 1906, from J. S. Perkins to the Commissioner of Indian Affairs, Washington, offered, introduced and read in evidence, as Defendant's Exhibit No. 23.

Defendant's Exhibit No. 23.

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, January 2, 1906.

The Honorable the Commissioner of Indian Affairs,
Washington, D. C.

Sir:

I have the honor to acknowledge the receipt of your letter "Finance, 101523-1905," dated December 19, 1905, giving the opinion of the Attorney General and the Secretary of the Interior in the Boggs case, and directing me to notify Boggs and his representatives to vacate the Reservation. I reply I respectfully submit this report. This order from you was received [278] Sunday, December 24th. I immediately went to the agency at San Carlos to inform the Agent. His clerk was there and I

informed him of the order, requesting that it be promptly executed when necessary. Copies of letters to Mr. Boggs and his representative here, J. R. Hopper, are enclosed. Hopper did not want to go, and kept hanging around the school, blowing off as usual. I notified the Agent that he must move, and Mr. McMurran sent him away Sunday night.

I seized the following material and it is all here at the school: Hopper's tool chest; 2 boxes of hardware; 12 kegs of nails; 8 truss rods with washers; 26 rolls building paper; all the stone that was in the building; 10 yards of sand; 5400 lbs. of lime; 3 car loads of lumber & shingles. The material is worth several thousand dollars. I respectfully and especially ask that the building may be reconstructed at as early a date as possible, as it is badly needed.

I would recommend that the foundation be taken down to the ground and rebuilt, as the two fires have ruined the mortar. The inside surface of all stone exposed to high heat should be removed to a depth of two inches; this will make the outside walls 16 inches thick instead of 18 inches as required by the specifications, and the partitions would be only 6 inches, entirely too thin. I respectfully ask that you give me authority at an early date to use this stone in the construction of small buildings already authorized. It would save much. If this authority cannot be granted now owing to the legal status of the case, or for other reasons, I request that you so inform me at an early date.

It is a great relief to have the Boggs outfit away. The building was insured October 3d with the Fire-

men's Fund, San Francisco. A letter from the General Adjuster is herewith. [279] Please return the same to me unless you have use for it. The Office will note that Boggs insured the building after it was rejected. Civil and criminal prosecution by the Attorney General of the United States is the proper medicine for Boggs.

Very respectfully,

J. S. PERKINS,

Superintendent.

The following letter dated December 28th, 1905, from J. S. Perkins to J. R. Hopper, offered, introduced and read in evidence as Defendant's Exhibit No. 24.

Defendant's Exhibit No. 24.

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, Dec. 28, 1905.

Mr. J. R. Hopper, Talklai, Arizona.

Sir:

For your information there is enclosed herewith a copy of a communication addressed and sent to Augustus W. Boggs, Riverside, California. You must comply strictly and promptly with the order and take your departure from the Reservation at once.

Very respectfully,

(Signed) J. S. PERKINS,

Superintendent.

I certify that the above is a true copy.

J. S. PERKINS,

Supt. [280]

The following letter dated May 31st, 1906, from C. F. Larrabee, Acting Commissioner of Indian Affairs, to the Honorable Secretary of the Interior, offered, introduced and read in evidence as Defendant's Exhibit No. 25.

Defendant's Exhibit No. 25.

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs.

Washington, May 31, 1906.

6 Enclosures

The Honorable,

The Secretary of the Interior,

Sir:

I have the honor to acknowledge the receipt by your reference of the 13th ultimo for consideration and report, of a letter from the Comptroller of the Treasury relative to the suit against A. W. Boggs of Riverside, California, contractor for the erection of a mess hall and kitchen at the Rice Station School, Arizona, and the surety on his bond, the United States Fidelity and Guaranty Company of Baltimore, Maryland, for \$7896.40 for two partial payments made to said Boggs on the above named work. In his letter the Comptroller of the Treasury calls attention to the fact that the books of that Department fail to disclose any indebtedness growing out of the contracts in question. He further says that at the time the two payments were made they were entirely correct and in accordance with the terms of the written contract, but since that time the contractor has totally failed to accomplish the work he

undertook to complete and the building he had partially erected is entirely burned down—all of which make the contractor guilty of a breach of contract; and the question now is; What, if any, are the damages accruing to the United States on account of said breach? [281]

The Comptroller suggests that this Department make an investigation and prepare a statement showing what are the actual damages growing out of the failure of the contractor to complete his contract; and that a statement of the case, with the papers pertaining thereto, be forwarded to the Attorney General of the United States with the request that a suit be commenced by him through the proper District Attorney for the recovery of the damages sustained by the United States on account of the breach in question.

In compliance with the suggestion of the Comptroller of the Treasury the Office, on April 19, 1905, telegraphed Supervisor M. F. Holland to make an investigation at the Rice Station School and report the amount of damages sustained by the Government on account of the failure of the contractor, Mr. Boggs, to erect the mess hall according to the agreement. A copy of the report of Supervisor Holland is enclosed herewith, in which the damages sustained by the Government through the failure of Contractor Boggs to deliver the building at the time specified are fixed at \$17,098.40 and are ascertained from the following items:

Vouchers approved by the Superintendent, for payment to Contractor Boggs under Article 9 of the contract approved March 27, 1905.....	\$7895.40
Cost of New laundry (Exhibit B).....	4339.10
Cost of temporary bakery (Exhibit B)...	23.90
Damage to school by loss of use of mess hall from Sept. 1, 1905 to date (May 1, 1906) 242 days at not less than \$20 per day,.....	4840.00
	<hr/>
	\$17098.40

This report also says that to the above should be added the difference between the contract price of said building—\$12,709—and the price that will have to be paid under the new contract if the latter shall be in excess. At the present time the office cannot estimate what said difference in price will be. [282]

The cost of the new laundry and temporary bakery is arrived at by a carefully estimated account and is considered by the Office to be very low. Attention is also invited to the fact that this report is dated May 1, 1906, and the damages to the school on account of the loss of the building are estimated only to that date. These damages will not average less per day up to the time a new building can be erected and it is respectfully recommended that the fact be considered.

Your attention is also invited to the fact that the United States Fidelity and Guaranty Company of Baltimore, Maryland, surety on the bond of Mr. Boggs, was notified of his failure to complete the

contract on January 16, 1906, but further than to acknowledge the receipt of said notice and, later, on February 24th, to protest against what was termed the arbitrary action of this Department, no action has been taken by the Company towards settling its liability on this bond.

The enclosures of your letter are returned herewith.

Very respectfully,
C. F. LARRABEE,
Acting Commissioner.

The following letter from J. S. Perkins to the Commissioner of Indian Affairs dated March 30th, 1907, offered, introduced and read in evidence as Defendant's Exhibit No. 27.

Defendant's Exhibit No. 27.

DEPARTMENT OF THE INTERIOR.

United States Indian Service.

Rice Station School,

Talklai, Arizona, March 30, 1907.

The Honorable the Commissioner of Indian Affairs,
Washington, D. C.

Sir: [283]

Herewith I have the honor to forward two communications from Mr. James H. Owen, and one from Mr. Oscar Lawler, United States Attorney in charge of the Boggs case. Mr. Lawler recommends that the Boggs material be sold to Mr. Owen, and the latter wants to make the purchase. The material consists of dimension stuff, sheathing, shingles, mill-worked lumber for door and window frames, 12 kegs of nails,

25 rolls of building paper and a little hardware consisting of pulleys for windows, and the white stone. I will state for the information of the Office that the material shipped in by Boggs is all of good quality. The white stone I will reject mostly, except for partition walls, and have so informed Mr. Owen's foreman. Mr. Boggs' outside walls were only 17 and 18 inches thick, while the specifications called for them to be 20 inches thick. One or two inches must come off on account of the fire, so this would make only about a 16 inch wall. I have no objection to offer to the rest of the material, and in the light of Mr. Lawler's opinion, would respectfully recommend its sale to Mr. Owen, and also the sale of the white stone. I respectfully ask that the office inform me at an early date of its decision in the matter.

Very respectfully,

J. S. PERKINS,

Supt.

The following notice of January 16, 1906, addressed by the Acting Commissioner of the Bureau of Indian Affairs to the United States Fidelity and Guaranty Company, offered, introduced and read in evidence as Defendant's Exhibit No. 28.

Defendant's Exhibit No. 28.

DEPARTMENT OF THE INTERIOR.

Office of Indian Affairs.

Washington, D. C., Jan. 16, 1906.

[284]

United States Fidelity and Guaranty Company,
Baltimore, Maryland.

Gentlemen:

Referring to the contract of Augustus W. Boggs,

of Riverside, Cal., with this Department, approved March 27, 1905, for the erection of a stone mess hall and kitchen at the Rice Station School, Arizona, upon which contract you are surety in the sum of \$6500, you are informed that when said building was offered to the Government by the contractor it was found upon inspection that the building had not been erected in accordance with the specifications of the contract, poor workmanship, inferior material and gross carelessness in construction being everywhere evidenced, and the building was therefore rejected. Later, on Nov. 4, 1905, the building was completely destroyed by fire while in the hands of the contractor's representatives.

Mr. Boggs, having failed to comply with his contract, is considered a defaulter and this is to notify you that the Department is about to institute suit on his bond and the papers are now being prepared for that purpose.

Very respectfully,

C. F. LARRABEE,

Acting Commissioner.

The said case having been argued and submitted, the Court then rendered the following oral opinion:

[Oral Opinion, etc.]

The COURT.—I have no doubt but that the Surety Company in this, as in all other like cases, has a right to insist that the owner of the property shall not make progress payments unless those payments are authorized by the contract. I am pretty clear on that proposition—that a wrongful payment [285] would be a wrongful surrender by the owner

of the property of a security which, in justice to the Surety Company, he ought to utilize for his own benefit, and that if he wrongfully surrenders that security it works prejudice. When I say "wrongful," I mean if he does it contrary to the provisions of the contract, he wrongfully surrenders, then, a security or a fund which the Surety Company would have a right to insist should be preserved to secure the performance of the contract or indemnity against its cost of performance. I have no question about that proposition of law. But I don't think that in this case that that was a wrongful payment. I have given to the matter the best thought I have been able to bestow upon it during the trial and argument of the case, and I think that that provision of section 9 of the contract provides that those progress payments shall be paid whenever the Government is satisfied that the conditions exist which under the contract authorize that payment, that is, eighty per cent of the value of the work and materials in place. The Government must ascertain that value. I am satisfied of that. And it ought to do it in a reasonable way. But what is a reasonable method of ascertaining that fact must depend in each case upon the circumstances of the case. If that building was to be constructed in the city of Washington, it would be reasonable to say to the Government, "You have that inspection made at the end of thirty days by one of your architects, and ascertain in that way before you make these progress payments." That probably would not be unreasonable under a contract reading as this does; if the

building were in Washington or in Los Angeles that would not probably be an unreasonable interpretation of the contract. But, as I said before, that provision of the contract must be construed with reference to the conditions here. This house was being erected in the Territory of Arizona, upon an Indian reservation, thousands [286] of miles from the seat of the Government.

Now, what must the Government do to ascertain when these progress payments should be made? And the Surety Company can not insist upon anything more than reasonable efforts on the part of the Government to ascertain that fact. The Government has its superintendent of the reservation, down there, the superintendent of the school and the superintendent of the reservation—a man of general intelligence, although not a professional architect; and I am inclined to think that it was not unreasonable for the *the* Government to say, "I will rely upon the information that I get from this superintendent as to the progress payments—as to whether or not the conditions exist which require these progress payments." I think that is a mere construction to put upon it and I shall accordingly so hold. And that disposes of the question of the release of the Surety Company by reason of these payments.

I have already indicated that nothing transpired—that there was no change, no valid change, in the contract after the rejection of the building, and that therefore nothing that occurred subsequent to September could relieve the Surety Company from its liability.

Mr. BOWEN.—Will the Court hold that the Government was authorized in ejecting Mr. Boggs on the 28th of December?

The COURT.—I don't know whether that is necessary.

Mr. BOWEN.—It seems to me that is a vital part of the case.

The COURT.—Oh, I think the Government had a right, so far as the contract is concerned, to stop the work at any time, yes, after the rejection of the building. There was never any contract for an extension. It may be that Perkins stayed there and looked on and permitted things to be done; but he had no [207] authority whatever from the Government to do that, and whatever he may have permitted was entirely in excess of his authority. I think the Government could have gone there at any time and ejected Boggs or any other stranger from the reservation who have no rights there. I thought at the time it was an arbitrary thing to take the property and not let him remove it, unless they had taken it under the provision of the contract which authorized them to take the materials and complete the contract. But that the Government didn't intend to do; and I think it was an arbitrary thing to say to a man that he could not remove his property. That is the way it impresses me; but that they had a right to stop the contract, and I presume they had a right to eject all persons, that the Government can exercise the right to eject all persons from the Government reservation who have no right to be there.

I shall enter judgment against both defendants for

the progress payments. What do they aggregate?

Mr. NISBET.—\$7,895.40.

The COURT.—I shall deduct from that—while he has made an extremely forcible presentation of the authorities bearing upon that question, I cannot agree with Mr. Horton on the Government's contention that they can let another contract that differs in two hundred items of details from the Boggs' contract more than a year after the Boggs' contract had been declared forfeited and then force that or accept that as a measure of the damages. I can't agree to that at all. I may say in this contract there is a difference of \$500, and it is proper to take Mr. Owens' statement as the maximum. There is a difference of \$500 in these items. And besides, his contract involved an additional expenditure of \$1200 that were not embraced in the Boggs' contract. It would not subserve any useful purpose to inquire into the reasons of that, but I mention it [288] to show that it was a different contract from the Boggs' contract. The removal of the foundations. I think he said \$1200.

Mr. HORTON.—That inadvertently slipped my mind. Mr. Owens stated that had he been compelled to remove the stone and foundation his contract price of \$16,600 would have been greater. So that that has already been accounted for.

The COURT.—Leave that out. But here is \$500 which he says himself is the difference between the contract, and two hundred items. That is sufficient, to my mind, for not taking that as a measure of the damages. But, more conclusive is the fact that the

Government waited for twelve or fifteen months. I suppose the Government hadn't determined that. Perkins hoped the Government would go forward and begin the house. Perhaps the Government didn't know what it would do after the cancellation of the Boggs' contract, whether it would go ahead and erect the house or not. I am so convinced I would not allow that as a measure of damages that I don't care to hear further about it. For the owner of property to wait for over a year before it commenced the building of the new structure and then claim that should be taken as the measure of damages—I don't think the authorities read justify the conclusion; and I would not adopt it if they did.

Mr. HORTON.—That is not the holding of this decision I read, the one you have just announced, that the Government can wait and then declare that the contract price shall be the measure of damages. It simply holds, as I understand it, if I may be pardoned for this declaration at this time, that the Government is entitled—

The COURT.—I understand your position.

Mr. HORTON.—Now, whether the Government waited a year—

The COURT.—You made that argument; but it don't appeal [289] to me. If counsel suppose that the announcement of the views of the Court were for the purpose of argument, I would never reach a conclusion; and when I begin the announcement of my views it is not with a view of inviting argument, but simply to indicate the reasons that direct the conclusions which I announce. If the

owner of property should never build, manifestly you could not claim that as a measure of damages, although there are one or two cases there that say that under certain circumstances you could prove the value of what the building would be—the reasonable cost of it—and make that a measure of damages. But I hold that where the Government delays the matter of constructing, for over a year, the new building, that it ought not to be considered an element of damage.

Now, with reference to the counterclaim, I think the testimony of Mr. Owens—the purchase by Mr. Owens of the materials from the contractor is not a fair criterion of their value. I think a more reliable measure of their value is the money actually expended, the price, for the materials, freight added, and the delivery on the ground.

With reference to the rock, I think Mr. Owen's testimony is the most reliable. I don't think that rock had but very little value; and I shall allow for that rock \$200. And I do that only because Mr. Owens says that his impression is that the Government received that amount for it. \$200 is about the amount that he estimated to be the value of the rock.

So that the judgment of the Court will be that the plaintiff recover of these defendants; and the amount of the recovery will be the aggregate of the progress payments, reduced by the materials as shown by the invoices, with \$200 added for the rock; which makes about \$2,400; which, subtracted from \$7,800 leaves [290] somewhere in the neighborhood of \$5,500 as the amount to be recovered against Boggs and the

Surety Company. And the figures you can estimate, Mr. Horton, and prepare findings accordingly and submit them to the other side before they are presented for signature.

Mr. HORTON.—Do I understand your Honor allows \$154 for the hauling?

The COURT.—Yes; I think that should be allowed. I am not so clear about that item. When you prepare the judgment I will figure it over again.

Mr. HORTON.—I will ask counsel whether or not findings will be waived.

Mr. BOWEN.—We want findings, of course.

The COURT.—Any exceptions you want to take will be taken when the findings and judgment are entered.

Mr. BOWEN.—Yes, sir.

The COURT.—You can now make the announcement if you want to; but there is nothing now for you to except to.

Mr. BOWEN.—I was going to suggest, however, that the ruling on the admission of some of the evidence—

The COURT.—I think probably I will let all that evidence in, with the understanding it was admitted at the time subject to my final determination of the questions. I don't think it makes any difference whether it is in or excluded. It would involve some degree of labor to determine exactly what should go out under this ruling; whereas, to overrule objections to the testimony on both sides and let the testimony all in it seems to me amounts to the same thing.

Mr. HORTON.—With the understanding that we have appropriate exceptions to the rulings.

The COURT.—Oh, yes. Each side.

Mr. BOWEN.—We have the same, of course.
[291]

The COURT.—Can you see any difference?

Mr. BOWEN.—I don't think so.

The COURT.—And I think practical justice is done to let in all testimony of a doubtful character, subject to the final disposition of the case when the Court determines it.

Mr. BOWEN.—So that it is made clear on what basis the judgment is rendered, so that we can point out on the appeal the particular part of it that affects us.

Mr. HORTON.—Does your Honor's judgment include interest against the surety for the delay in the payment?

The COURT.—That is a question about which I do not know.

Mr. BOWEN.—I would resist that, your Honor.

The COURT.—That would involve a computation of the interest on the counterclaim.

Mr. HORTON.—It would be a simple matter of calculation.

The COURT.—I had thought of that. If interest is calculated at all it should be calculated both upon the \$8,000 or the \$7,900, and also on the credit of \$2,400. I don't know whether it is competent to compute interest or not in a suit for unliquidated damages.

Mr. BOWEN.—That would be my contention.

The COURT.—You might look into that, and if you want to make any point on that I will hear you on it.

Mr. HORTON.—Yes, sir.

[Recital Re Testimony, etc.]

The testimony hereinbefore contained, constituted all of the testimony taken on the trial of the above-entitled action.

On the 18th day of July, 1910, the said Court made and filed in said action the following Findings of Fact, Conclusions of Law and decision: [292]

[Findings, Conclusion, and Decision in Bill of Exceptions.]

“This cause came on regularly for trial on the 13th day *day* of April, one thousand nine hundred and ten, and was tried before the Court without a jury, a trial by jury having been expressly waived by a stipulation in writing signed by the attorneys of the respective parties and filed with the Clerk of the above-mentioned Court, the defendant The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, having duly appeared in said action and filed its answer therein and the defendant Augustus W. Boggs having failed and refused to appear in said action, and his default having been duly filed and entered in said action; said cause was tried upon the complaint of plaintiff and the complaint of plaintiff as amended during the course of the said trial, leave of Court so to amend said complaint having first been duly obtained, and the answer of said The United States Fidelity and

Guaranty Company of Baltimore, Maryland, a corporation, and the answer of said The United States Fidelity and Guaranty Company of Baltimore, Maryland, as amended during the course of said trial, leave of Court so to amend having first been duly obtained; A. I. McCormick, Esq., the United States Attorney, and G. Ray Horton, Esq., Assistant United States Attorney, appearing as attorneys for the Plaintiff, and Messrs. Gray, Barker, Bowen, Allen, Van Dyke & Jutten and William A. Bowen, Esq., appearing as attorneys for the Defendant, The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation; witnesses having been sworn and examined and the Court having duly heard the proof and evidence, oral and documentary, introduced in the cause on behalf of the respective parties, and having considered the same, and the cause having been closed and after argument duly submitted to the Court for its decision; the Court now files its decision in writing and finds facts as follows, to wit: [293]

I.

That each and all of the statements and allegations contained in paragraph 1 of plaintiff's complaint in this action are true.

II.

That on the 23d day of February, 1905, the United States of America, pursuant to the proceedings regularly had and taken in that behalf by the Department of the Interior of the said United States, acting by and through the then Acting Commissioner of Indian Affairs, C. F. Larrabee, made and entered into a contract in writing with Augustus W. Boggs,

one of the defendants in this action, under and by the terms of which said contract said Augustus W. Boggs agreed, for a consideration of the unit price of Twelve Thousand Seven Hundred and Nine (\$12,709) Dollars; to furnish all the labor and materials and to do and perform all the work required to construct and complete a stone mess-hall and kitchen at the Rice Station Indian School in the Territory of Arizona, in strict and full accordance with the terms of a certain advertisement in said contract set forth and with the requirements of certain drawings, plans and specifications, copies of which were attached to and made a part of said contract and embodied therein, and to complete said mess-hall and kitchen in strict and full accordance with the said contract and the said plans, drawings and specifications, and to turn the said stone mess-hall and kitchen so completed over to the said United States of America, acting through and by said Acting Commissioner of Indian Affairs, as aforesaid, on or before the 1st day of September, 1905. [294]

III.

That on the 11th day of March, 1905, the defendant Augustus W. Boggs and the defendant The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, as aforesaid, made and entered into a bond and undertaking in writing to secure the faithful performance by the said Augustus W. Boggs of the aforesaid contract between the United States of America and Augustus W. Boggs; that Exhibit "A," attached to plaintiff's complaint, is a true and correct copy of said bond

and undertaking; that said bond and undertaking in writing so made and entered into was a part of the transaction of making and entering into said contract between said Augustus W. Boggs and the United States of America, dated the 23d day of February, 1905, and hereinbefore referred to.

IV.

That on the 27th day of March, 1905, the said contract and bond were duly and lawfully approved by the then Secretary of the Interior of the United States of America.

V.

That thereafter, to wit, on or about the 12th day of April, 1905, and prior to the 1st day of September, 1905, said Augustus W. Boggs commenced operations on the construction of the said mess-hall and kitchen at the said Rice Station Indian School and furnished certain materials and did certain work; that the materials so furnished and the work so done were not, nor was either of them, in compliance with or pursuant to the terms of said contract, and the said defendant Augustus W. Boggs did not at any time complete said mess-hall and kitchen in strict and full accordance with, or substantially, or at all, in accordance with, said contract, nor with the plans, drawings and specifications that were a part of said contract. [295]

VI.

That said defendant Augustus W. Boggs wilfully, intentionally and fraudulently disregarded the terms of his contract with plaintiff from the beginning of his operations thereunder, and continued in such dis-

regard, as aforesaid, at all times up to and including the 28th day of December, 1905, and at all times thereafter.

VII.

That after the said contract and bond became effective and prior to the commencement of the woodwork necessary to the construction of the said stone mess-hall and kitchen, to wit, on or about the 31st day of May, 1905, the defendant, Augustus W. Boggs, employed an agent, one J. C. Kincaid, as his foreman, to do and have done the woodwork construction on the said stone mess-hall and kitchen, and then gave him certain drawings for his instruction in said work other than the plans, drawings and specifications heretofore mentioned as a part of said contract; that as such agent of the defendant Augustus W. Boggs, the said Kincaid, following the specific directions and instructions theretofore given by the said Augustus W. Boggs, built as a part of the roof of said stone mess-hall and kitchen, a certain large wooden truss; that the said Kincaid did not build and construct said truss in accordance with the plans, drawings and specifications referred to in the aforementioned contract, but according to a detail drawing essentially different therefrom, made by the defendant Augustus W. Boggs, and delivered by him to the said Kincaid with instructions to follow the said detail drawings instead of the said plans, drawings and specifications; that the said Kincaid thereafter built certain purlins in the roof of said stone mess-hall and kitchen in accordance with the aforesaid detailed drawing instead of the plans,

drawings and specifications specified in said contract, (said detailed drawing being essentially different therefrom), in this instance, also following the directions [296] of the said defendant Augustus W. Boggs; that it was not possible for defendant Augustus W. Boggs through his said agent, or at all, to do the woodwork in the manner and with the materials specified in the plans, drawings and specifications *foresaid*, because the defendant, Augustus W. Boggs, did not at any time furnish the said Kincaid with the necessary and required materials; that the work done for the defendant Augustus W. Boggs by the said Kincaid was performed with the knowledge of said defendant Augustus W. Boggs, and in such manner as was necessitated by the materials furnished by defendant Augustus W. Boggs, without regard to said contract and said plans, drawings and specifications, that the defendant, Augustus W. Boggs, was at all times without authority to proceed in the aforesaid woodwork construction on any other plans, drawings and specifications than those specified in the said contract; that no wall-plates and no stay-bolts were used in the construction of said stone mess-hall and kitchen or at all, as required in said plans, drawings and specifications; that one foot-bolt only was used at the end of each truss, while the plans, drawings and specifications aforesaid called for two foot-bolts at each end, that the work that the said Kincaid did as aforesaid on said stone mess-hall and kitchen, was not done in accordance with the plans, drawings, and specifications specified in said contract, but consti-

tuted and was a wilful and substantial departure from said contract and said plans, drawings and specifications, a part thereof as aforesaid.

VIII.

That on the said 28th day of December, 1905, the plaintiff, acting under the terms of the contract aforesaid, by means and on account of the wilful and intentional failure and refusal of the said Augustus W. Boggs to perform the terms of [297] said contract, and to complete and turn over said building as therein required, took possession of the premises and site of said stone mess-hall and kitchen at said Rice Station Indian School, and directed the said defendant, Augustus W. Boggs, to leave the Indian Reservation where said building had been located.

IX.

That on the 10th day of June, 1905, plaintiff paid, and caused to be paid, to the said Augustus W. Boggs, and the said Augustus W. Boggs received from Plaintiff, in advance of said unit price of \$12,709, and on account thereof, the sum of Four Thousand Three Hundred and Fifty-six Dollars and Twenty-four Cents (\$4,356.24), and on the 21st day of July, 1905, the said plaintiff paid to the said Augustus W. Boggs, and the said Augustus W. Boggs received, the further sum of Three Thousand Five Hundred and Thirty-nine Dollars and Sixteen Cents (\$3,539.16); that both of said payments were paid as aforesaid pursuant to the terms of said contract, and that both of said payments make a total of Seven Thousand Eight Hundred and Ninety-five Dollars and Forty cents (\$7,895.40).

X.

That no part of said sum of Seven Thousand Eight Hundred and Ninety-five Dollars and Forty Cents (\$7,895.40) has been repaid or returned to said plaintiff; that said Augustus W. Boggs now has, and ever since the payment of the said sum to him, as aforesaid, has had said sum of Seven Thousand Eight Hundred and Ninety-five Dollars and Forty Cents (\$7,895.40) and the use and benefit of the same.

XI.

That said Augustus W. Boggs did not, nor did any one on his behalf, furnish all of the labor and materials, nor did [298] the defendant do or perform all of the work required to construct and complete a stone mess-hall and kitchen at said Rice Station Indian School as provided for by the terms of his said contract as aforesaid, nor did he on or before the 1st day of September, 1905, or at all, complete the work provided for in said contract, nor did he at or before said last-mentioned date, or at all, turn over to the said plaintiff the said stone mess-hall and kitchen at the said Rice Station Indian School either in accordance with the terms of his said contract, otherwise or at all.

XII.

That on the 1st day of September, 1905, said Augustus W. Boggs had failed to complete the work in said contract provided for in accordance with said contract or within the time therein provided for.

XIII.

That at all times from and after said 1st day of

September, 1905, the said Augustus W. Boggs failed to take such action as would remedy his default in the performance of the terms of said contract as hereinabove found.

XIV.

That on or about the 3d day of October, 1905, the said defendant, Augustus W. Boggs, caused to be insured, and insured against loss by fire the said stone mess-hall and kitchen; that is to say, his interest in the same.

XV.

That on or about the 27th day of October, 1905, the plaintiff rejected the work done, materials furnished and building thereby and thereof constructed as previously offered for acceptance by the said Augustus W. Boggs.

XVI.

That on the 4th day of November, 1905, while said work, [299] material and structure were still in possession of said Augustus W. Boggs, said work, material and structure were completely destroyed by fire.

XVII.

That afterwards, about the 28th day of December, 1905, plaintiff did, on account and by reason of the failure and refusal of said Augustus W. Boggs to perform the terms of said contract or to complete and turn over said building as thereunder required or to remedy the default in performance of said contract as hereinbefore indicated, take possession of the premises and site of said stone mess-hall and kitchen at said Rice Station Indian School, and ever since

that time plaintiff has remained continuously in possession thereof.

XVIII.

That Augustus W. Boggs, shortly after the 4th day of November, 1905, did not in accordance with the terms and provisions of the aforesaid contract, commence the reconstruction, or any construction, of said stone mess-hall and kitchen; that any work of reconstruction, or any work, done after said date, was outside of said contract and without the consent of plaintiff.

XIX.

That on the 28th day of December, 1905, plaintiff, by its duly authorized officers and agents, notified Augustus W. Boggs and his representatives who were then and there on the premises aforesaid, to leave said premises, to vacate the Indian Reservation aforesaid and to desist from doing any work on which they were then and there engaged; that thereupon said Augustus W. Boggs, and his agents and representatives immediately vacated said premises and ceased all work on said premises.

XX.

That on the 28th day of December, 1905, and at the time said Augustus W. Boggs was ordered to leave said premises, the [300] said Augustus W. Boggs had belonging to him and located upon said premises certain building materials, tools and implements, of the reasonable value of \$2418.58; that all of said materials, tools and implements, as aforesaid, were confiscated and seized by plaintiff, although the same then and there belonged to Augustus W. Boggs, as aforesaid.

XXI.

That no part of the said materials, tools and implements, as aforesaid, were ever returned to the defendants herein, or either of them, nor was any part of the value thereof ever paid to the defendants or either of them; that, on the contrary, all of said materials, tools and implements, as aforesaid, were kept, retained and used by the plaintiff.

XXII.

That Augustus W. Boggs did not well and truly observe, perform, fulfill, accomplish and keep all and singular the covenants, conditions and agreements whatsoever, which, on his part should have been observed, performed, fulfilled, accomplished and kept, comprised and mentioned in the aforesaid contract bearing date of the 23d day of February, one thousand nine hundred and five, between the plaintiff and himself, in that he wilfully, knowingly, purposely, fraudulently and intentionally failed, neglected and refused to erect a structure in accordance with the plans and specifications that were a part of his contract aforesaid.

XXIII.

That it is not true that said plaintiff did not comply with the terms, covenants and agreements, in said contract specified, but it is true that plaintiff has duly and regularly performed all of the terms, conditions and obligations of said contract on its part to be performed; it is not true that [301] plaintiff, without the knowledge or consent of said defendants, or either of them, or at all, or in violation of the terms of said contract, or in violation of

the terms or conditions of said bond, or at all, changed or abrogated the terms of said contract in any particular; it is not true that said plaintiff, without the knowledge or consent of the defendants, or either of them, or at all, extended the time of the performance of said contract for the said Augustus W. Boggs, otherwise or at all; it is not true that the failure and delay of the said Augustus W. Boggs to complete the said mess-hall and kitchen within the period of time prescribed by said contract, was by or with the consent of the said plaintiff; it is not true that the said plaintiff without the knowledge or consent of the defendants or either of them further violated, or violated at all, the terms or conditions of said contract either by building or causing to be built the said stone mess-hall and kitchen on or along different lines than those provided for in said contract, or that plaintiff caused said stone mess-hall and kitchen to be built or constructed in violation of or contrary to the plans, drawings and specifications made a part of said contract; it is not true that under or pursuant to the directions of plaintiff in the construction of said stone mess-hall and kitchen by said defendant Augustus W. Boggs, said work was improperly done, or that plaintiff caused the said stone mess-hall and kitchen to be constructed by said defendant Augustus W. Boggs improperly or in violation of the terms and specifications agreed upon in said contract; it is not true that through the act, or any act, of plaintiff herein, the consideration for the bond mentioned in said complaint has wholly failed, or failed at all, or that

the same is null and void and without effect. [302]

XXIV.

That on or about the 8th day of December, 1906, plaintiff, acting by and through the then Commissioner of Indian Affairs, advertised for bids to be received on or before January 16, 1907, for the construction of a stone mess-hall and kitchen at said Rice Station Indian School; that certain bids were received in response to said advertisement; that of said bids so received, the lowest received was the bid of one James H. Owen, of Los Angeles, California; that on the 22d day of January, 1907, in pursuance of said bid said James H. Owen entered into a written contract with plaintiff for the construction of a stone mess-hall and kitchen for the sum of \$16,600 on the site occupied by the building theretofore constructed by the said Augustus W. Boggs; that the said sum of \$16,600 was paid by the plaintiff to the said James H. Owen under said contract for the construction of said building thereunder in lieu of the stone mess-hall and kitchen agreed to be built for and delivered to plaintiff by said Augustus W. Boggs under and by the terms of said contract with him, heretofore referred to, to be by him completed as aforesaid; that the said James H. Owen, constructed the building aforesaid according to the contract between himself and plaintiff, and in accordance with the plans and specifications thereunto attached; that the reasonable value of the structure built by the said James H. Owen under the contract, plans and specifications between himself and plaintiff, was \$16,600 at the time the same was constructed; that

the aforesaid contract, plans and specifications between plaintiff and the said James H. Owen were different in many substantial respects from the contract, plans and specifications between plaintiff and the said Augustus W. Boggs; that the building required to be rerected and actually erected by the said James H. Owen under [303] his contract, plans and specifications, was different in many substantial respects from the building required to be erected by the said Augustus W. Boggs under his contract, plans and specifications; that \$1200 of the contract price required to be paid and actually paid to the said James H. Owen under his contract, applied to work wholly outside of the work provided for in the contract, between the said Augustus W. Boggs and plaintiff; that \$500 of the aforesaid contract price required to be paid and actually paid to the said James H. Owen under his contract by plaintiff, was for work and materials in excess of what was embraced and included in the contract between the said Augustus W. Boggs and plaintiff; that the cost of labor and building supplies was different in 1907 from their costs in 1905, and that plaintiff waited from the 28th day of December, 1905, to the 22d day of January, 1907, before entering into a new contract for the construction of said building, and that by reason of the lapse of time and the changes in prices in the meantime, a comparison between the two contracts furnishes no basis for estimating the plaintiff's damages in this case.

As CONCLUSIONS OF LAW from the foregoing findings, the Court finds that the failure, refusal

and neglect of Augustus W. Boggs, as aforesaid, comprised a breach of the said contract and of the obligation of the aforesaid bond and undertaking in writing made and entered into by the defendant, The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, and that by reason thereof the United States is entitled to recover against the said defendants herein as contingent advances on account of said contract (said contract being entire, and the right of defendant Augustus W. Boggs to retain the same after the 1st day of September, 1905, depending upon his performing said contract in strict and full compliance with the [304] terms thereof), the sum of Four Thousand Three Hundred and Fifty-six Dollars and Twenty-four Cents (\$4,356.24), and the further sum of Three Thousand Five Hundred and Thirty-nine Dollars and Sixteen Cents (\$3,539.16), together with the *furm* sum of Twenty-six Hundred and Ninety-four Dollars and Thirty-two Cents (\$2,694.32) (which sum of \$2,694.32 is equivalent to interest at seven per cent per annum on said sums of \$4,356.24 and \$3539.16 from the 1st day of September, 1905, to date of entry of judgment herein), all as damages for the aforesaid breach, aggregating damages in the sum of Ten Thousand Five Hundred and Eighty-nine Dollars and Seventy-two Cents (\$10,589.72); and the Court finds that the defendants Augustus W. Boggs and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, are entitled to be allowed, as a setoff and counterclaim in their favor, the sum of Twenty-four Hundred and

Eighteen Dollars and Fifty-eight Cents (\$2,418.58), as the reasonable value of labor and material confiscated by the United States on the 28th day of December, 1905, together with interest thereon at the rate of seven per cent (7%) per annum from said 28th day of December, 1905, in the sum of Seven Hundred and Sixty-eight Dollars and Five Cents (\$768.05), aggregating the sum of Thirty-one Hundred and Eighty-six Dollars and Sixty-three Cents (\$3,186.63), which said sum of \$3,186.63 shall be, and is, hereby set off and credited against the aforesaid sum of \$10,589.72, the difference, to wit, Seventy-four Hundred and Three Dollars and Nine Cents (\$7,403.09), being the amount that the Court finds plaintiff is entitled to recover in this action; provided, however, the liability of the said defendant The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, shall not exceed the sum of Sixty-five Hundred Dollars (\$6,500.00) on account of the damages aforesaid, exclusive of costs of suit, the said sum [305] of \$6,500.00 being the penal amount specified and limited in its said bond and undertaking in writing, as aforesaid, and the Court finds that the plaintiff is also entitled to recover from said defendants, its costs of suit.

IT IS ORDERED that judgment be entered in accordance herewith.

Done in open court this 18th day of July, 1910.

OLIN WELLBORN,
Judge."

Whereupon judgment was entered herein in accordance therewith.

[Exceptions.]

To which Findings of Fact, Conclusions of Law and Decision, and to every part thereof, said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, on December 15, 1910, excepted, and said defendant excepted to the failure of said Court to find upon the following issues tendered by the pleadings and the evidence to wit:

Whether the payments made by plaintiff to the defendant Augustus W. Boggs, during the progress of the construction work prosecuted by said defendant under the building contract between plaintiff and said defendant, in evidence in said case, were made without right and in violation of said contract, and to the prejudice of the defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, and whether said payments if unwarranted by the terms of said contract, released said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, from liability under the bond in evidence in said case.

Whether the terms and conditions of said contract between plaintiff and the defendant Augustus W. Boggs, or any of them, were changed or altered by plaintiff and said defendant without the consent of the defendant United States Fidelity & Guaranty [306] Company of Baltimore, Maryland, and whether said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, was thereby released from liability under said bond.

Whether plaintiff estopped itself by any acts, omissions or agreements, from setting up or main-

taining any claim against said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, under said bond.

Whether plaintiff permitted said defendant Augustus W. Boggs after September 1st, 1905, by act, conduct, or agreement, to rectify the defective construction work in the building constructed by the said Boggs under said contract, and whether plaintiff extended the time allowed said Boggs by said contract for completing said construction work.

Whether during the course of said construction or reconstruction, said building was destroyed by fire without the fault of defendant United States Fidelity & Guaranty Company of Baltimore, Maryland.

Whether plaintiff notified said defendant within a reasonable time of the alleged default of said Boggs.

Whether plaintiff prevented the said defendant Boggs from completing said construction work in accordance with said contract, or with any contract supplementary thereto.

Whether plaintiff prevented the said defendant Boggs from completing said reconstruction work in accordance with the permission therefor given said Boggs by said plaintiff, and whether plaintiff was precluded from recovering anything from said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, by reason of said issues or any of them, and whether said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, was released from liability under said bond by reason of said issues, or any of them. And

[307] said defendant also excepted to the findings of said Court that said defendant is liable under said bond to plaintiff, that plaintiff is not precluded from recovering anything from said defendant under said bond, and that said defendant is not released from liability under said bond.

All of which exceptions were allowed by said Court, on December 15, 1910, subject to plaintiff's objection that the same were presented too late.

To the foregoing findings of fact and conclusions of law and decision, and to every part thereof, plaintiff excepted on said December 15, 1910; and said plaintiff excepted to the failure of said Court to find and decide that plaintiff is entitled to interest on the sum of Sixty-five Hundred Dollars (\$6,500.00), from the 1st day of September, 1905, and to the failure of the Court to enter judgment against said defendant for such interest; and said plaintiff excepted, also to the failure of said Court to find and decide that plaintiff is entitled to recover the difference between the contract price under the building contract between plaintiff and Augustus W. Boggs and the contract price under the building contract between plaintiff and James H. Owen.

All of which exceptions were allowed by said Court, on December 15, 1910, subject to said defendant's objection that the same were presented too late.

**[Recital Re Stipulations and Orders Re Bill of
Exceptions.]**

By written stipulations between plaintiff and said defendant United States Fidelity & Guaranty Com-

pany of Baltimore, Maryland, duly filed in said action, and by orders of said Court duly made and entered therein, it was stipulated and ordered that said defendant have to and including the 15th day of December, 1910, in which to serve and file its proposed bill of exceptions for use on writ of error and appeal herein, and that [308] plaintiff have to and including the 20th day of December, 1910, within which to serve and file its proposed amendments to said proposed bill of exceptions; that in case in the meantime counsel for plaintiff and for said defendant should agree upon the settlement and allowance of a bill of exceptions, and should so stipulate in writing, said defendant need not serve or file its proposed bill of exceptions, and plaintiff need not serve or file its proposed amendments thereto, but said stipulation and engrossed bill of exceptions should be filed on or before the 20th day of December, 1910, and the same should be immediately settled and allowed by the judge of said Court; that execution on any judgment entered herein against said defendant be stayed, together with all other proceedings for the enforcement thereof, until said defendant should within the time allowed by law, obtain a writ of error herein and file a supersedeas bond duly approved by the Court, in an amount to be fixed by the Court.

Counsel for plaintiff and for said defendant having agreed upon the settlement and allowance of the foregoing bill of exceptions, for use by plaintiff and said defendant upon writ of error and appeal to be taken by them respectively, and having so stipulated

in writing, and said stipulation being filed herewith,

NOW, THEREFORE, in accordance therewith and in furtherance of justice and that right may be done, the plaintiff and the defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, tender and present the foregoing as the bill of exceptions in this case, to be used by them respectively on writ of error and appeal to be taken by them respectively, and pray that the same may be settled and allowed and signed by the Court and made a part of the record, for use by said parties respectively as aforesaid, and the same is accordingly done this 15th day of December, 1910.

OLIN WELLBORN,
Trial Judge. [309]

[Stipulation Re Bill of Exceptions.]

IT IS HEREBY STIPULATED AND AGREED, that the foregoing bill of exceptions be settled and allowed, and signed by the Court and made a part of the record in the above-entitled action, for use by plaintiff on its writ of error and appeal to be taken herein and for use by defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, on its writ or error and appeal to be taken herein.

Dated, December 15th, 1910.

A. I. McCORMICK, (H. O.)
United States District Attorney,
G. RAY HORTON,
Assistant U. S. District Attorney,
Attorneys for Plaintiff.

GRAY, BARKER, BOWEN, ALLEN, VAN
DYKE & JUTTEN,

Attorneys for Deft. U. S. Fidelity and Guaranty Co.
of Baltimore, Maryland.

[Endorsed]: No. 1399. In the Circuit of the
United States, Ninth Circuit, Southern District of
California, Southern Division. United States of
America, Complainant, vs. Augustus W. Boggs and
U. S. Fidelity & Guaranty Company, Defendants.
Engrossed Bill of Exceptions for Use on Writ of
Error and Appeal by Plaintiff and Defendant U. S.
Fidelity & Guaranty Company. Filed Dec. 15, 1910.
Wm. M. Van Dyke, Clerk. Chas. N. Williams, Dep-
uty. Gray, Barker, Bowen, Allen, Van Dyke & Jut-
ten, Equitable Bank Building, First and Spring Sts.,
Los Angeles, Cal., Attorneys for U. S. F. & G. Co.
[310]

*In the Circuit Court of the United States, Ninth Cir-
cuit, Southern District of California, Southern
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUGUSTUS W. BOGGS and UNITED STATES
FIDELITY AND GUARANTY COMPANY
OF BALTIMORE, MARYLAND (a Corpora-
tion),

Defendants.

Stipulation [Re Payment of Cost of Transcribing and Printing Bill of Exceptions].

IT IS HEREBY STIPULATED AND AGREED, by and between the plaintiff and the defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, that two-thirds of the bill of exceptions settled by the Court and agreed to by said parties for use on the writ of error to be obtained by said defendant, and for use on the writ of error to be obtained by said plaintiff, was inserted and included in said bill of exceptions at the instance of and for the particular purposes of the said defendant; that one-third thereof was inserted at the instance of and for the particular purposes of said plaintiff, and that in consideration of the stipulation by said defendant that the aforesaid one-third of said bill of exceptions would be included therein for the particular use of said plaintiff on its writ of error, said plaintiff shall pay one-third of the cost of transcribing and printing said bill of exceptions in connection with the review of said case by the Circuit Court of Appeals, and that in case said defendant shall be required to advance the whole cost thereof for the purpose of bringing said case before said Circuit Court of [311] Appeals, before plaintiff shall have paid its one-third of said cost, plaintiff shall immediately on demand, reimburse said defendant to the extent of one-third of the cost of transcribing and printing said bill of exceptions.

This stipulation is made subject to confirmation by the Attorney General of the United States, and

vs. The United States of America. 365

the undersigned United States District Attorney shall immediately take measures to procure such confirmation.

Dated December 15th, 1910.

A. I. McCORMICK, (H. O.)

United States District Attorney.

G. RAY HORTON,

Asst. United States District Attorney,

Attorneys for Plaintiff.

GRAY, BARKER, BOWEN, ALLEN, VAN

DYKE & JUTTEN,

Attorneys for Defendant U. S. Fidelity & Guaranty
Co. of Baltimore.

[Endorsed]: Original. No. 1399. In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division. United States of America, Complainant, vs. Augustus W. Boggs and U. S. Fidelity & Guaranty Company, Defendants. Stipulation. Filed Dec. 15, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Gray, Barker, Bowen, Allen, Van Dyke, & Jutten, Equitable Bank Building, First and Spring Sts., Los Angeles, Cal., Attorneys for U. S. F. & G. Co. [312]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.

THE UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY OF BALTIMORE,
MARYLAND (a Corporation), and AUGUS-
TUS W. BOGGS,

Defendants.

**Petition for Writ of Error and Supersedeas by
Defendant United States Fidelity and Guaranty
Company of Baltimore, Maryland.**

Comes now the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, one of the defendants in the above-entitled cause by Messrs. Gray, Barker, Bowen, Allen, Van Dyke & Jutten, its attorneys, and, feeling itself aggrieved by the decision and judgment rendered and entered by said Court in said cause on the 18th day of July, 1910, petitions said Court for an order allowing said defendant to prosecute a writ of error to the Honorable United States Circuit Court of Appeals, Ninth Circuit, under and according to the laws of the United States in that behalf made and provided.

That a transcript of the records, proceedings and papers on which said judgment was made and entered, duly authenticated, may be sent to said United States Circuit Court of Appeals for the Ninth Cir-

cuit, and also that an order be made fixing the amount of the security which the defendant shall give and furnish upon said writ of error, and that upon giving said security, all further proceedings of this court be [313] suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray, etc.

Dated January 16th, 1911.

GRAY, BARKER, BOWEN, ALLEN, VAN
DYKE & JUTTEN,

Attorneys for Defendant United States Fidelity &
Guaranty Company of Baltimore, Maryland.

[Endorsed]: Original. No. 1399. In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division. United States of America, Complainant, vs. U. S. Fidelity & Guaranty Co. of Baltimore, Maryland, a Corporation et al., Defendants. Petition for Writ of Error and Supersedeas by Defendant U. S. F. & G. Co. of Baltimore, Maryland. Filed Jan. 16, 1911. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy Clerk. Gray, Barker, Bowen, Allen, Van Dyke & Jutten, Equitable Bank Building, First and Spring Sts., Los Angeles, Cal., Attorneys for U. S. F. & G. Co. [314]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

AUGUSTUS W. BOGGS and THE UNITED
STATES FIDELITY AND GUARANTY
COMPANY OF BALTIMORE, MARYLAND
(a Corporation),

Defendants.

Assignment of Errors.

Comes now the defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, and files the following Assignment of Errors, upon which it will rely upon its prosecution of the Writ of Error in the above-entitled cause, to wit:

I.

Said Circuit Court of the United States, for the Ninth Circuit, Southern District of California, Southern Division, erred in giving, making, rendering and entering judgment in the above-entitled cause in favor of the plaintiff and against said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland.

II.

Said Court erred in giving, making, rendering and entering judgment in the above-entitled cause, in favor of plaintiff and against said defendant, for the amount of the two payments received by the defend-

ant Augustus W. Boggs from plaintiff, referred to in the Ninth Finding herein, one received on the 10th day of June, 1905, and the other on the 21st day of July, 1905, amounting together to \$7,895.40, or any part of said two payments, and the Court erred in finding and deciding that said payments, or any part thereof, constituted any measure of the recovery of plaintiff against said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland. [315]

III.

The Court erred in making and filing Finding IX, as follows:

“That on the 10th day of June, 1905, plaintiff paid, and caused to be paid, to the said Augustus W. Boggs, and the said Augustus W. Boggs received from plaintiff, in advance of said unit price of \$12,709, and on account thereof, the sum of four thousand three hundred and fifty-six dollars and twenty-four cents (\$4,356.24) and on the 21st day of July, 1905, the said plaintiff paid to the said Augustus W. Boggs, and the said Augustus W. Boggs received, the further sum of three thousand five hundred and thirty-nine dollars and sixteen cents (\$3,539.16); that both of said payments were made as aforesaid pursuant to the terms of said contract, and that both of said payments make a total of seven thousand eight hundred and ninety-five dollars and forty cents (\$7,895.40).”

And said Court erred particularly in making and

filing that portion of said finding contained in the following words:

"That both of said payments were made as aforesaid pursuant to the terms of said contract."

It appears from the evidence, and said Court should have so found, that both of said payments were made in violation of the terms of the contract between plaintiff and the said A. W. Boggs for the construction of the building at Rice Station Indian School, Arizona. By the terms of said contract, the plaintiff agreed to pay said A. W. Boggs the sum of Twelve Thousand Seven Hundred and Nine Dollars (\$12,709.00), as follows:

"Eighty (80) per centum of the value of the work executed and actually in place to the satisfaction of the party of the first part at the expiration of each thirty (30) days during the progress of the work, the amount of each payment to be computed upon the actual amount of labor and materials expended during the said period of thirty (30) days for which partial payment is to be made, (the said value to be ascertained by the party of the first part); and the balance thereof will be retained until the completion of the entire work, and the approval and acceptance of the same by the party of the first part."

It appears from the evidence that said payments were not made to said A. W. Boggs at the expiration of each thirty days during the progress of the work; that the amount of each of said payments [316]

was not computed upon the actual amount of labor and materials expended during said period of thirty days, for which such partial payments were respectively made; that said payments were made to the said A. W. Boggs for work which was not executed and actually in place to the satisfaction of the plaintiff; that said payments were made without plaintiff's being satisfied with the work executed and actually in place; that the work executed and actually in place at the time of the making of said payments, respectively, was glaringly and obviously defective to any person of reasonable intelligence, and easily found to be so by the exercise of reasonable and ordinary care; that the work now complained of by the plaintiff, and found by the Court to be defective, was executed and actually in place at the time of the making of said payments, respectively; that said payments were made by plaintiff without the knowledge or consent of said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, although plaintiff knew, or should have known by the exercise of reasonable care, that the work then executed and actually in place was defective and not in accordance with the plans and specifications, and that said payments were made negligently, carelessly and in violation of said contract and to the *detriment* United States Fidelity & Guaranty Company of Baltimore, Maryland. The evidence is insufficient to support said finding in the respects mentioned.

IV.

That said Court erred in making and filing Find-

ing XIII, as follows:

“That at all times from and after said 1st day of September, 1905, the said Augustus W. Boggs failed to take such action as would remedy his default in the performance of the terms of said contract as hereinabove found.”

It appears from the evidence that the said A. W. Boggs, after the first day of September, 1905, with the consent and [317] and permission of plaintiff, undertook to remedy the default in the performance of the terms of said contract and did, in fact, take such action as would remedy same, and was engaged in the work of remedying the same when said building was destroyed by fire on the 4th day of November, 1905. It further appears from the evidence that immediately after said fire said Boggs commenced the reconstruction of said building, in accordance with said plans and specifications, and with the consent and permission of plaintiff; that he was engaged in such reconstruction and was taking all necessary measures for that purpose when, on the 28th day of December, 1905, he was notified by the plaintiff to leave said premises, to stop said work and to quit the Indian Reservation, in which said premises were located, all of which he was compelled and forced to do by plaintiff, and actually did; that he was thereby prevented by plaintiff from completing said building in accordance with said plans and specifications; that said prevention was without cause and without right; and that on and after the 1st day of September, 1905, plaintiff extended the time specified in said contract for the completion of

said work; all of which was without the knowledge of said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, and to its detriment. The evidence is insufficient to support said finding in the respects mentioned.

V.

Said Court erred in making and filing Finding XV, as follows:

"That on or about the 27th day of October, 1905, the plaintiff rejected the work done, materials furnished and building thereby and thereof constructed as previously offered for acceptance by the said Augustus W. Boggs."

It appears from the evidence that said Augustus W. Boggs was first notified of the rejection of said building by plaintiff [318] by letter dated September 16, 1905; that thereafter, said rejection was withdrawn and said Augustus W. Boggs was authorized and permitted by plaintiff to remedy the defects in said construction, and was given by plaintiff additional time within which to do so, which withdrawal and which permission and extension of time were not revoked by plaintiff until the 28th day of December, 1905, when said Augustus W. Boggs was notified by plaintiff to stop said work and leave said premises. It further appears from the evidence that the said withdrawal of said rejection and the said permission to the said Augustus W. Boggs to proceed with the work on said building, in accordance with said plans and specifications, and the extension of time granted by plaintiff for the purpose of enabling him to complete said work in

accordance with said plans and specifications, were all without the knowledge or consent of said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, and to its detriment. The evidence is insufficient to support said finding in the respects mentioned.

VI.

Said Court erred in making and filing Finding XVII, as follows:

“That afterwards, about the 28th day of December, 1905, plaintiff did, on account and by reason of the failure and refusal of said Augustus W. Boggs to perform the terms of said contract or to complete and turn over said building as thereunder required, or to remedy the default in performance of said contract as hereinbefore indicated, take possession of the premises and site of said stone mess-hall and kitchen at said Rice Station Indian School, and ever since that time plaintiff has remained continuously in possession thereof.”

It appears from the evidence that plaintiff did not take and retain possession of said premises by reason of the failure and refusal of the said Boggs to perform the terms of said contract, or to complete and turn over said building as thereunder required, or to remedy the default in the performance of said contract; but, on the contrary, it appears from the evidence [319] that said plaintiff took and retained possession of said premises wrongfully and arbitrarily, without cause or right, while said Boggs was engaged under and by plaintiff's permission and

consent in the reconstruction of said building after its destruction by fire in accordance with said plans and specifications. It further appears from the evidence that said action was taken by plaintiff without the knowledge or consent of the defendant, United States Fidelity & Guaranty Company of Baltimore, Maryland, and to its detriment. The evidence is insufficient to support said finding in the respects mentioned.

VII.

Said Court erred in making and filing Finding XVIII, as follows:

"That Augustus W. Boggs, shortly after the 4th day of November, 1905, did not in accordance with the terms and provisions of the aforesaid contract, commence the reconstruction, or any construction, of said stone mess-hall and kitchen; that any work of reconstruction, or any work, done after said date, was outside of said contract and without the consent of plaintiff."

It appears from the evidence that immediately after the 4th day of November, 1905, the date of the destruction of said building by fire, the said Augustus W. Boggs commenced the reconstruction of the said building in accordance with the terms and provisions of the contract, plans and specifications; that this he did with the knowledge, consent and permission of plaintiff and without objection on its part; that the work of reconstruction, performed by him after said date, was performed with the consent of plaintiff; that plaintiff had actual knowledge thereof and made no objections, but on the contrary accepted

the work performed by him, as aforesaid, together with the materials and tools used by and belonging to said Boggs in said work of reconstruction, and that said work of [320] reconstruction, after said date, was performed by the said Boggs under the extension of time granted him by the plaintiff for such purpose. It further appears from the evidence that all of said work was performed, and all of said dealings were had between plaintiff and the said Boggs, without the knowledge or consent of said United States Fidelity & Guaranty Company of Baltimore, Maryland, and to its detriment. The evidence is insufficient to support said finding in the respects mentioned.

VIII.

Said Court erred in making and filing Finding XXII, as follows:

“That Augustus W. Boggs did not well and truly observe, perform, fulfill, accomplish and keep all and singular the covenants, conditions and agreements whatsoever, which, on his part, should have been observed, performed, fulfilled, accomplished and kept, comprised and mentioned in the aforesaid contract bearing date of 23d day of February, one thousand nine hundred and five, between the plaintiff and himself, in that he wilfully, knowingly, purposely, fraudulently and intentionally failed, neglected and refused to erect a structure in accordance with the plans and specifications that were a part of his contract aforesaid.”

It appears from the evidence that the work com-

plained of in this case was executed and actually in place at the time when plaintiff made to said defendant Boggs his two payments on account of said contract, to wit, on June 10, 1905, and July 21, 1905, amounting together to \$7,895.40; that plaintiff was authorized by said contract to make said payments only for work executed and actually in place to the satisfaction of plaintiff, at the expiration of each thirty days during the progress of the work, the amount of each payment to be computed upon the actual amount of labor and materials expended during the said period of thirty days for which partial payment was to be made, the said value to be ascertained by the plaintiff; that the first of said payments, amounting to \$4,356.24, being eighty [321] per cent of the work executed and actually in place on the 23d day of May, 1905, was made by plaintiff to the defendant upon a written certificate of J. S. Perkins, the Superintendent in charge of said work on the part of plaintiff, in the following words:

"I certify on honor that the foregoing account of Augustus W. Boggs is correct and just; that the work has been carefully inspected by Robert A. Smith, whose certificate appears above; that the stipulations of the contract have so far been fully complied with; that there is now due the said Augustus W. Boggs \$4,356.24, no part of which has been paid, and that I have issued this voucher in duplicate only.

"Dated at Rice Station School, Talklai, Arizona, May 23d, 1905."

And upon a written certificate signed by Robert

A. Smith, Engineer in charge of said work on behalf of plaintiff, as follows, to wit:

"I certify on honor that I have carefully inspected for the Indian Department work described in the foregoing, and find it to be actually in place and of the value represented; that it has been done in a workmanlike manner, and that the stipulations of the contract have so far been fully complied with.

"Dated at Rice Station School, Talklai, Arizona, May 23, 1905."

That the "foregoing account" referred to in the said certificates is an itemized account showing the above-mentioned sum due said A. W. Boggs, "being eighty per centum of the value of the work executed and actually in place as provided in section IX of said contract"; that the second of said payments was made by plaintiff upon written certificates, identical in form with the foregoing, signed by the same persons and bearing date June 30, 1905; that said certificates were given for the purpose of enabling the said Augustus W. Boggs to collect said payments, and said payments were made to him on the faith of said certificates, and that said payments were made without the knowledge or consent of said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, and to its detriment, whereby said plaintiff was precluded and estopped from maintaining [322] as against said defendant, that the work executed and actually in place on the dates of said certificates, respectively, and referred to in said certificates, being the same work

now claimed to have been defective, was not in fact executed and actually in place to the satisfaction of the plaintiff in the exercise of reasonable judgment and care, or that said work was not done in a workmanlike manner, or that the conditions of said contract had not on said dates been fully complied with, or that the said Boggs was not entitled to receive said payments on said dates, under the terms of said contract. It accordingly appears from the evidence, so far as the defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, is concerned, that the said Boggs did perform said contract and do the work herein complained of in accordance with said plans and specifications. The evidence is insufficient to support said finding in the respects mentioned.

IX.

Said Court erred in making and filing Finding XXIII, as follows:

"That it is not true that said plaintiff did not comply with the terms, covenants and agreements in said contract specified, but it is true that plaintiff has duly and regularly performed all of the terms, conditions and obligations of said contract on its part to be performed; it is not true that plaintiff, without the knowledge or consent of said defendants, or either of them, or at all, or in violation of the terms of said contract, or in violation of the terms or conditions of said bond, or at all, changed or abrogated the terms of said contract in any particular; it is not true that said plaintiff, without the knowl-

edge or consent of the defendants, or either of them, or at all, extended the time of the performance of said contract for the said Augustus W. Boggs, otherwise or at all; it is not true that the failure and delay of the said Augustus W. Boggs to complete the said mess-hall and kitchen within the period of time prescribed by said contract, was by or with the consent of the said plaintiff; it is not true that the said plaintiff without the knowledge or consent of the defendants or either of them, further violated, or violated at all, the terms or conditions of said contract either by building or causing to be built the said stone mess-hall and kitchen on or along different lines than those provided for in said [323] contract, or that plaintiff caused said stone mess-hall and kitchen to be built or constructed in violation of or contrary to the plans, drawings and specifications made a part of said contract; it is not true that under or pursuant to the directions of plaintiff in the construction of said stone mess-hall and kitchen by said defendant Augustus W. Boggs, said work was improperly done, or that plaintiff caused the said stone mess-hall and kitchen to be constructed by said defendant Augustus W. Boggs improperly or in violation of the terms and specifications agreed upon in said contract; it is not true that through the act, or any act, of plaintiff herein, the consideration for the bond mentioned in said complaint has wholly failed, or failed at all, or that

the same is null and void and without effect."

It appears from the evidence that the plaintiff violated its said contract with said Boggs in the following particulars: In addition to the provisions hereinbefore referred to relating to the payment of installments of eighty per cent of the value of the work in place, said contract provided as follows:

"Article 5. It is hereby further covenanted and agreed that the materials delivered and the work done under this contract shall be subject to the inspection of the party of the first part, or of other person or persons appointed by him, with the right to reject any part thereof not in accordance with this contract; and the decision of the said party of the first part shall be final."

The specifications attached to said contract provide as follows:

"11. The Commissioner of Indian Affairs, or his representative, may require the contractor to dismiss such workmen as he deems incompetent or careless, and is to have at all times access to the work which is to be entirely under his control.

"14. Except it be otherwise specified, all materials are to be of the best quality of their respective kinds, and all labor is to be done in the most thorough, prompt and workmanlike manner to the full satisfaction of the Commissioner of Indian Affairs or his representative.

"26. Each bidder must understand that, should his proposal be accepted, the materials delivered, and the work performed by him, at any and all times during the progress of the work, and prior to the

final acceptance of and payment for the same, shall be subject to the inspection of the Commissioner of Indian Affairs or his representatives, with the full right to accept or reject any part thereof."

Plaintiff accepted the duty of supervising, superintending, inspecting and maintaining control of said work throughout the whole thereof, and during the whole of said work maintained [324] on said premises a representative charged with the duty of superintending, supervising, inspecting, reporting upon and keeping control of said work; said representative, one J. S. Perkins, was wholly incapable and unfit to perform said duties and he performed them in a negligent, careless, inefficient and unskillful manner; although in exclusive and complete charge of said work, on behalf of plaintiff, he did not perform his duties with reasonable or ordinary diligence or care, nor with any diligence nor care at all. He failed and neglected to observe, object to, or report upon any of the defects in said work now claimed by the plaintiff, although the same were obvious to any person of reasonable intelligence; although he was in and about said work every day, he permitted said A. W. Boggs to execute and put in place work and to use therein materials not in accordance with the plans and specifications. At a time when the work now complained of was actually in place, and its defects obvious to any observer, he certified in writing to plaintiff, on his honor, for the purpose of enabling said A. W. Boggs to obtain from plaintiff payments to which he was not entitled under said contract, that the stipulations of his contract had so

far been fully complied with by the said Boggs, and that there were due him the amounts claimed by him; upon the faith of which certificates, the said Boggs did, if fact, obtain said money from plaintiff. One Robert A. Smith was employed by plaintiff under the said Perkins to inspect said work and certify to the sufficiency of the work, for the purpose of enabling said Boggs to obtain payment from plaintiff, and the said Smith was wholly incompetent and unfit for the performance of said duties, and did in fact perform the same in a negligent and careless manner without the exercise of reasonable or ordinary care or diligence, or any care or diligence whatever; and he, the said Smith, also [325] certified on his honor to the plaintiff, for the purpose of enabling the said Boggs to obtain the payments from plaintiff, as hereinbefore mentioned, that he had carefully inspected the work, that it had been done in a workmanlike manner, and that the stipulations in said contract had so far been fully complied with; whereas, in fact and in truth, he had not carefully inspected the work, nor inspected it at all, and the work had not been done in a workmanlike manner, and the stipulations of the contract had not been fully complied with, as the said Smith knew, or should have known, by the exercise of reasonable and ordinary care and diligence.

Said contract between plaintiff and the defendant Boggs further provides that in case the said Boggs should fail to complete the work in accordance with the contract, within the time therein provided for, or should fail to prosecute said work with such dili-

gence as in the judgment of the plaintiff would insure the completion of the work within the time provided for, the party of the first part therein should be authorized and empowered, after eight days' due notice thereof in writing to the party of the second part therein, to take possession of the said work and of all machinery and tools, employed thereon and all materials belonging to the party of the second part, and complete the work at the expense of the party of the second part. On the 28th day of December, 1905, said Boggs being then and there engaged in the reconstruction of said building, by and with the permission and authority of the plaintiff, notice was given to the said Boggs by the said Perkins that he must vacate the reservation at once. Boggs' work was summarily stopped and all his materials and tools were seized by the plaintiff. No eight days' notice in writing, specifying the defaults claimed by the plaintiff and allowing Boggs said [326] eight days within which to remedy said defaults, was ever given by plaintiff. At no time, either before or after the first day of September, 1905, was any such eight days' notice in writing given by plaintiff to said defendant Boggs.

Although the time fixed for the completion of said building under such contract was September 1, 1905, said time was extended by agreement between plaintiff and said defendant Boggs without the knowledge or consent of said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, and in pursuance thereof defendant Boggs continued after said date with the work of

construction of said building, in accordance with said plans and specifications, both before and after the date of the destruction thereof by fire, on the 4th day of November, 1905, and up to and including the 28th day of December, 1905, when he was summarily and without cause or reason or notice prevented by plaintiff, without the knowledge or consent of said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, from completing his work in accordance with said plans and specifications; after the aforesaid destruction of said work by fire on November 4, 1905, an extension of time for the reconstruction of said building was agreed upon between plaintiff and said defendant Boggs without the knowledge or consent of said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland.

Said defendant Boggs, while engaged in the reconstruction of said building in accordance with said plans and specifications, after its destruction by fire, and while so engaged by and with the consent and permission of plaintiff was prevented from completing said work by being summarily ejected from said premises by plaintiff as aforesaid.

After plaintiff took possession of said work, as aforesaid, it did not undertake to complete the same within a reasonable [327] time, nor at any time until the 22d day of January, 1907, when a new contract was made with another contractor for the completion of said work. At said time, and not before, plaintiff undertook to have said work completed and to have supplied the labor, materials and

tools necessary to be supplied for that purpose; but, in completing said building, plaintiff, without the knowledge or consent of said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, undertook to change, and did change the plan of construction in many important particulars amounting in all to over two hundred, in violation and abrogation of the original contract between plaintiff and the said Boggs.

After the first day of September, 1905, said defendant Boggs was permitted by plaintiff to retain possession of said premises and on November 4th, 1905, while they were in the possession of the said Boggs, they were destroyed by fire; said permission was given by plaintiff to said Boggs to keep and retain possession of said premises after said first day of September, 1905, without the knowledge or consent of said United States Fidelity & Guaranty Company of Baltimore, Maryland. Under the terms of said contract between the plaintiff and the said Boggs, it was "agreed that the entire work shall be completed and turned over to the party of the first part on or before September 1, 1905." This agreement was violated and abrogated by plaintiff by its agreement with said Boggs, permitting him to retain possession of said premises after said date, and it was while said premises were in possession of the said Boggs after said date that the same were destroyed by fire to the detriment of said defendant United States Fidelity & G Guaranty Company of Baltimore, Maryland.

All of the matters and facts hereinbefore stated

appear [328] in the evidence in this case, and it appears from said evidence that the consideration for the bond mentioned in the complaint herein has wholly failed, and that by reason of the matters and facts hereinbefore specified said bond was discharged and became null and void and without effect. All of the acts and agreements of plaintiff and of said defendant Boggs hereinbefore specified were performed and made without the knowledge or consent of said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, as appears from said evidence. The evidence is insufficient to support Finding XXIII in the respects mentioned.

X.

Said Court erred in finding that plaintiff is entitled to recover from said defendant United States Fidelity & Guaranty Company of Baltimore, Maryland, the amount of the aforesaid two installment payments made by plaintiff to the defendant A. W. Boggs, or any part thereof. Said payments do not constitute a measure of damage in this case. If plaintiff is entitled to recover at all, against said defendant, the measure of the plaintiff's recovery is the reasonable cost of remedying the defective work performed by the said A. W. Boggs as the same existed on the first day of September, 1905, and of making said building, as it existed on said date, conform to said original plans and specifications. There is no evidence in this case showing that such reasonable cost is identical with the amount of the two payments received by the said Boggs, and there

is no evidence whatever showing, or tending to show, what such reasonable cost was or should have been. It appears from the evidence that plaintiff never undertook, at all, to supply or remedy the defects existing in said work on September 1, 1905, nor to estimate, nor to have estimated, the reasonable or probable [329] cost thereof; but, on the contrary, it appears from the evidence that plaintiff made it impossible ever to arrive at said measure of damages by permitting the said A. W. Boggs to retain possession of said premises and of said building after said first day of September, 1905; by permitting him to proceed thereafter with the work of remedying said defects; by permitting him to proceed with said work after the building had been destroyed by fire; by preventing him from completing said work of reconstruction thereafter; by failing to take any action for the reconstruction of said building, on its own part, from the 28th day of December, 1905, to the 22d day of January, 1907, and by proceeding after said last mentioned date to reconstruct said building with numerous and important changes and modifications from the original plans and specifications; and that said measure of damage became impossible of ascertainment by reason of the destruction of said building by fire on the 4th day of November, 1905, while said building was in the possession of the defendant A. E. Boggs, by and with the consent and permission of the plaintiff. The evidence is insufficient to support said finding, or any finding in favor of a recovery against said defendant United States Fidelity & Guaranty

Company of Baltimore, Maryland, in any sum whatever.

XI.

Said Court erred in making and filing Findings XI, XIII, XVIII and XXII, aforesaid, for the reason that the said A. W. Boggs offered to plaintiff to perform his said contract with plaintiff in strict accordance therewith and with the plans and specifications thereto attached, which offer was accepted by plaintiff and the said Boggs was permitted by plaintiff to undertake and proceed with the performance of said contract, whereby the said United States Fidelity & Guaranty Company of Baltimore, Maryland, was exonerated. [330]

XII.

Said Court erred in failing to find each and all of the facts hereinbefore specified as shown by the evidence, in failing to find that by reason of said facts, and each of them, said bond was discharged and said United States Fidelity & Guaranty Company, of Baltimore, Maryland, exonerated, in failing to find that by reason of said facts, and each of them, no damage was shown as against said defendant, and in failing to find that by reason of said facts, and each of them, no recovery could be had herein against said defendant.

XIII.

Said Court erred in failing to find that plaintiff neglected to notify defendant United States Fidelity & Guaranty Company, of Baltimore, Maryland, within a reasonable time, of the alleged defaults of the said A. W. Boggs, to the detriment of said cor-

poration defendant. The evidence shows that the alleged defaults occurred, if at all, prior to June 30th, 1905, and that no notice thereof was given said defendant corporation until January 16th, 1906; and that between the time of said alleged defaults and the date of said notice plaintiff had paid said Boggs \$7,895.40 for work constituting the alleged defaults, had extended the contract time for the completion of the building, had permitted said Boggs to retain possession of said building, after the date fixed by the contract for its delivery to plaintiff, had permitted him to tear down and reconstruct said building and had wrongfully and without cause prevented him, by summary ejectment, without notice, from completing the reconstruction commenced with its consent and permission; and that during said period, and after September 1st, 1905, said building was destroyed by fire; all of which took place without the knowledge, consent, or participation of said defendant corporation.

WHEREFORE, said defendant United States Fidelity & Guaranty Company, of Baltimore, Maryland, prays that the judgment [331] of the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division, be reversed, and such directions be given that full force and efficacy may inure to said defendant by reason of the defenses set up in its answer and amendment thereto, and the evidence produced,

offered, and introduced before said court at the trial of said cause.

GRAY, BARKER, BOWEN, ALLEN, VAN
DYKE & JUTTEN,

Attorneys for Defendant United States Fidelity &
Guaranty Company of Baltimore, Maryland.

[Endorsed]: No. 1399. In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division. Original. The United States of America, Plaintiff, *vs.* Augustus W. Boggs, and the United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, Defendants. Assignment of Errors. Filed Jan. 16, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Gray, Barker, Bowen, Allen, Van Dyke & Jutten, Equitable Bank Bldg., First and Spring Sts., Los Angeles, Cal. Telephones: Home 10601, Sunset Main 685. Attys. for Deft. U. S. Fid. & Guary. Co. of Baltimore, Md. [332]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

THE UNITED STATES OF AMERICA,
Plaintiff,
vs.

THE UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY OF BALTIMORE, MARY-
LAND (a Corporation), and AUGUSTUS W.
BOGGS,

Defendants.

**Order Allowing Writ of Error and Fixing
Supersedeas Bond.**

The above-named defendant, United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, having this day filed its petition for a writ of error from the judgment made and entered herein, to have the same reviewed by the United States Circuit Court of Appeals for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which said defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this Court be suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals for the Ninth Circuit;

NOW, THEREFORE, it is ordered that a writ of error be and is hereby allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby is fixed at Ten Thousand (\$10,000.00) and that upon the filing of said bond according to law and the [333] approval thereof by the Court, all further proceedings in the court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals, the filing and approval of said

bond to act as a supersedeas in the premises.

Dated January 16th, 1911.

OLIN WELLBORN,

Judge.

[Endorsed]: Original. No. 1399. In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division. The United States of America, Complainant, vs. U. S. Fidelity & Guaranty Co., a Corporation et al., Defendants. Order Allowing Writ of Error and Fixing Supersedeas Bond. Filed Jan. 16, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Gray, Barker, Bowen, Allen, Van Dyke & Jutten, Equitable Bank Building, First and Spring Sts., Los Angeles, Cal., Attorneys for U. S. F. & G. Co. [334]

*In the United States Circuit Court of Appeals,
Ninth Judicial Circuit.*

UNITED STATES FIDELITY AND GUARANTY
COMPANY OF BALTIMORE, MARY-
LAND (a Corporation),

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Bond on Writ of Error.

Know All Men by These Presents, that we, United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, as principal, and the National Surety Company, a corporation organized and

existing under and by virtue of the laws of the State of New York, and duly licensed and authorized by the State of California to transact business as surety within said State of California, as surety, are held and firmly bound unto the United States of America, defendant in error above-named, in the sum of Ten Thousand Dollars (\$10,000.00) to be paid to the said United States of America, for which payment well and truly to be made, we bind ourselves and each of us jointly and severally, and our and each of our successors, representatives or assigns, firmly by these presents.

Sealed with our seals, and dated the 16th day of January, 1911.

The condition of the above obligation is such that whereas, the above-named plaintiff in error, United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, has sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment [335] in the above-entitled cause by the Circuit Court of the United States for the Ninth Circuit, Southern District of California, Southern Division, therein rendered on the 18th day of July, 1910;

NOW, THEREFORE, the condition of this obligation is such that if the above-named United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, shall prosecute said writ to effect, and answer all costs and damages, if it shall fail to make good its plea, then this obligation to

be void; otherwise to remain in full force and virtue.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY OF BALTIMORE,
MARYLAND,

[Seal] By HARRY D. VANDEVER.
NATIONAL SURETY COMPANY, [Seal]

By PHILIP KITCHIN,
Resident Vice-President.

By H. EVERETT CHARLTON,
Resident Assistant Secretary.

Bond approved this 16th day of January, 1911.

OLIN WELLBORN,
Judge.

O. K. as to form.

HORTON

Asst. U. S. Atty.

AFFIDAVIT, ACKNOWLEDGMENT, AND
JUSTIFICATION BY GUARANTEE OR
SURETY COMPANY.

State of California,
County of Los Angeles,—ss.

On this sixteenth day of January, one thousand nine hundred and eleven, before me personally came Philip Kitchin, known to me to be the Resident Vice-president of the National Surety Company, [336] the corporation described in and which executed the within and foregoing Bond of United States Fidelity & Guaranty Company of Baltimore, Md., as a surety thereon, and who, being by me duly sworn, did depose and say that he resides in the City of Los Angeles, State of California; that he is the Resident Vice-president of the said Company, and

knows the corporate seal thereof; that the said National Surety Company, is duly and legally incorporated under the laws of the State of New York; that said Company has complied with the provisions of the Act of Congress of August 13th, 1894, that the seal affixed to the within Bond of United States Fidelity & Guaranty Company of Baltimore, Md., is the corporate seal of said National Surety Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Resident Vice-president of said Company, and that he is acquainted with H. Everett Charlton and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said H. Everett Charlton subscribed to said Bond is in the genuine handwriting of said H. Everett Charlton, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by more than the sum of TWENTY THOUSAND dollars.

That Frank L. Gilbert is our agent to acknowledge service in the Judicial District wherein this bond is given.

PHILIP KITCHIN,
(Deponent's Signature.)

Sworn to, acknowledged before me, and subscribed
in my presence this sixteenth day of January, 1911.

[Seal]

HAZEL JONES,

(Officer's Signature, description and seal.)

NOTARY PUBLIC in and for the County of Los
Angeles, State of California. [337]

[Endorsed]: Original. No. 1399. In the United
States Circuit Court of Appeals, Ninth Judicial Cir-
cuit. United States Fidelity and Guaranty Com-
pany of Baltimore, Maryland, a Corporation, Plain-
tiff in Error, vs. United States of America, Defendant
in Error. Bond on Writ of Error. Filed Jan. 16,
1911. Wm. M. Van Dyke, Clerk. By Chas. N.
Williams, Deputy Clerk. Gray, Barker, Bowen,
Allen, Van Dyke & Jutten, Attys. for Plaintiff in
Error, Equitable Bank Building, Los Angeles, Cal.
[338]

[Waiver and Declaration of Augustus W. Boggs.]

*In the Circuit Court of the United States, Ninth Cir-
cuit, Southern District of California, Southern
Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

UNITED STATES FIDELITY AND GUARANTY
COMPANY (a Corporation), and AUGUS-
TUS W. BOGGS,

Defendants.

The undersigned, Augustus W. Boggs, one of the
defendants in the above-entitled action, hereby

waives all rights on his part to a review of the judgment against him entered in the above-entitled action on the 18th day of July, 1910, and hereby declares that he has no intention to take any steps for a review thereof by writ of error or otherwise, and agrees that said defendant United States Fidelity and Guaranty Company of Baltimore, Maryland, may prosecute its writ of error in said action without notice of any kind to him, without making him a party thereto, and without the service on him of any citation or other paper in connection therewith.

Dated January 17, 1911.

A. W. BOGGS.

Witness:

WILLIAM A. BOWEN. [339]

[Endorsed]: Original. No. 1399. In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division. United States of America, Complainant, vs. United States Fidelity & Guaranty Company and Augustus W. Boggs, Defendants. Waiver of Right of Review of Judgment by Defendant, Augustus W. Boggs. Filed Jan. 19, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Gray, Barker, Bowen, Allen, Van Dyke & Jutten, Equitable Bank Building, First and Spring Sts., Los Angeles, Cal., Attorneys for U. S. F. & G. Co. [340]

[Certificate of Clerk U. S. Circuit Court to Record.]

*In the Circuit Court of the United States of America,
of the Ninth Judicial Circuit, in and for the
Southern District of California, Southern Di-
vision.*

No. 1399.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUGUSTUS W. BOGGS and THE UNITED
STATES FIDELITY & GUARANTY COM-
PANY OF BALTIMORE, MARYLAND (a
Corporation),

Defendants.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing three hundred and forty (340) typewritten pages, numbered from 1 to 340, inclusive, and comprised in one volume, to be a full, true and correct copy of the pleadings and of all papers and proceedings upon which the judgment in favor of the plaintiff was made and entered in said cause, and also of the bill of exceptions, assignment of errors, petition for and order allowing the writ of error and bond on writ of error in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error.

I do further certify that the costs of the foregoing

[341] record in \$293.80/100, the amount whereof has been paid to me by The United States Fidelity & Guaranty Company of Baltimore, Maryland, the plaintiff in error in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division, this 28th day of April, in the year of our Lord one thousand nine hundred and eleven and of our Independence the one hundred and thirty-fifth.

[Seal]

WM. M. VAN DYKE,
Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California.

By Chas. N. Williams,
Deputy Clerk. [342]

[Endorsed]: No. 1982. United States Circuit Court of Appeals for the Ninth Circuit. The United States Fidelity and Guaranty Company of Baltimore, Maryland, a Corporation, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the Southern District of California, Southern Division.

Filed May 1, 1911.

F. D. MONCKTON,
Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY OF BALTIMORE,
MARYLAND (a Corporation),

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Order Extending Time [to April 1, 1911] to File
Record.**

Good cause appearing therefor, it is hereby ordered that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the first day of April, 1911.

Dated at Los Angeles, California, January 16, 1911.

OLIN WELLBORN,

United States District Judge for the Southern District of California.

[Endorsed]: In the United States Circuit Court of Appeals, Ninth Judicial Circuit. United States Fidelity and Guaranty Company of Baltimore, Maryland, a Corporation, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Extending Time to File Record. Filed Jan. 16, 1911. Wm. M. Van Dyke, Clerk. By _____, Deputy Clerk. Filed Jan. 17, 1911. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY OF BALTIMORE,
MARYLAND (a Corporation),

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Order Extending Time [to May 1, 1911] to File
Record.**

Good cause appearing therefor, it is hereby ordered that the time heretofore allowed said plaintiff in error to docket said cause and file the record thereof with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged and extended to and including the first day of May, 1911.

Dated at Los Angeles, California, March 31st, 1911.

OLIN WELLBORN,

United States District Judge for the Southern District of California.

[Endorsed]: United States Circuit Court of Appeals for the Ninth Circuit. United States Fidelity and Guaranty Company of Baltimore, Maryland, Plaintiff in Error, vs. United States of America, Defendant in Error. Order Extending Time to File Record. Filed April 1, 1911. F. D. Monekton, Clerk.

*In the United States Circuit Court of Appeals, Ninth
Judicial Circuit.*

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY OF BALTIMORE,
MARYLAND (a Corporation),
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

**Order Extending Time [to May 20, 1911] to File
Record.**

Good cause appearing therefor, it is hereby or-
dered that the time heretofore allowed said plaintiff
in error to docket said cause and file the record
thereof with the Clerk of the United States Circuit
Court of Appeals for the Ninth Circuit, be and the
same is hereby enlarged and extended to and includ-
ing the 20th day of May, 1911.

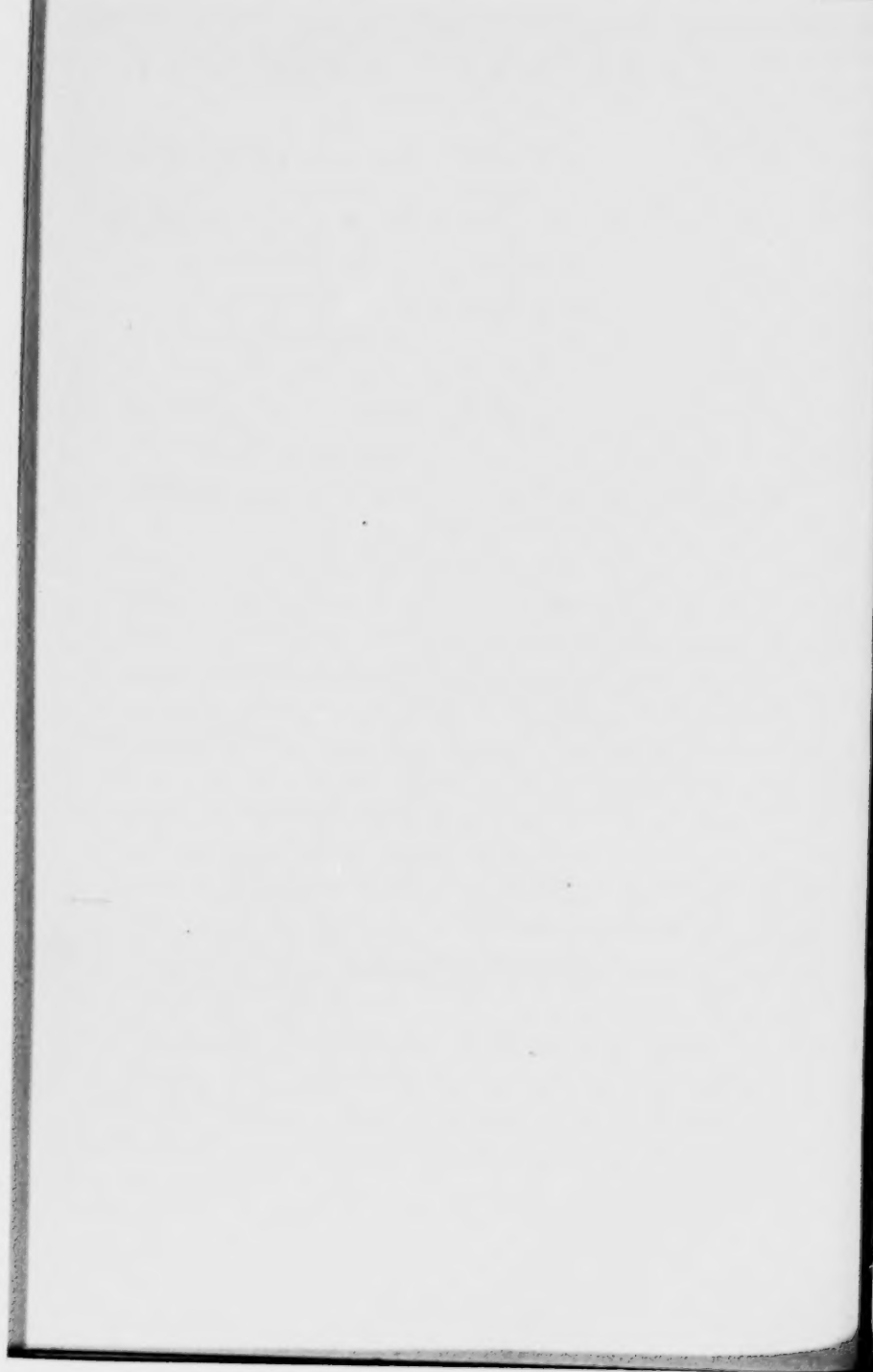
Dated at Los Angeles, California, April 26th, 1911.

OLIN WELLBORN,

United States District Judge for the Southern Dis-
trict of California.

[Endorsed]: Filed Apr. 27, 1911. F. D. Monckton,
Clerk.

No. 1982. United States Circuit Court of Appeals
for the Ninth Circuit. Order Enlarging Time to File
Record Thereof and to Docket Cause. Re-filed May
1, 1911. F. D. Monckton, Clerk.



No. 1982

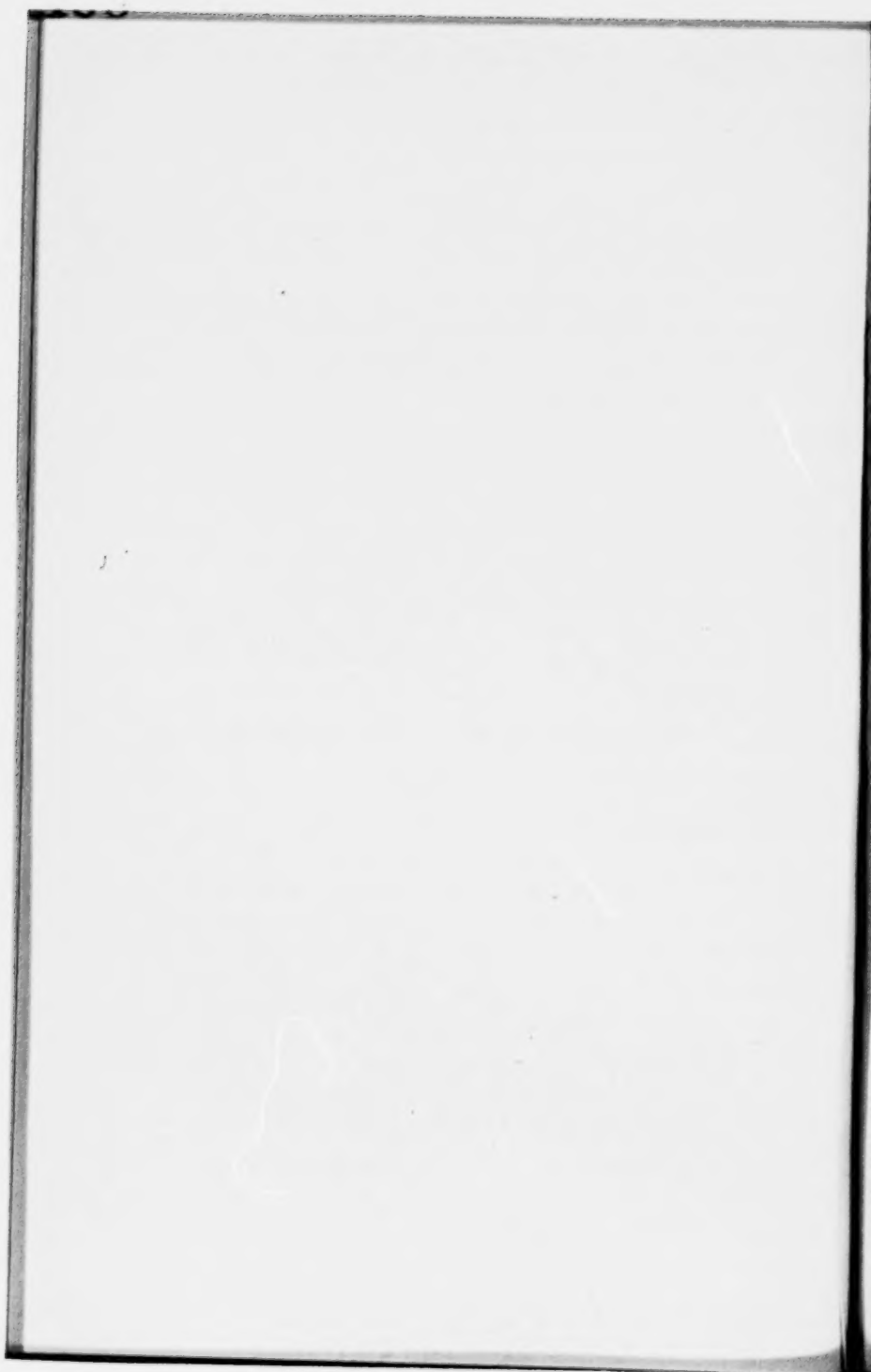
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.

THE UNITED STATES OF AMERICA,
Cross-plaintiff in Error,
vs.

AUGUSTUS W. BOGGS and THE UNITED
STATES FIDELITY AND GUARANTY
COMPANY OF BALTIMORE, MARYLAND
(a Corporation),
Cross-defendants in Error.

TRANSCRIPT OF RECORD.

Upon Cross-Writ of Error to the United States
Circuit Court for the Southern District
of California, Southern Division.



Names and Addresses of Attorneys.

For Cross-Plaintiff in Error:

A. I. McCORMICK, Esq., United States Attorney, Los Angeles, California.

G. RAY HORTON, Esq., Assistant United States Attorney, Los Angeles, California.

For Cross-Defendant in Error, The United States Fidelity and Guaranty Company of Baltimore, Maryland:

Messrs. GRAY, BARKER, BOWEN, ALLEN,
VAN DYKE & JUTTEN, Los Angeles,
California.

Cross-writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judge of the Circuit Court of the United States for the Southern District of California, Southern Division:

Because in the record and proceedings, as also in the rendition of judgment in the case of The United States of America, plaintiff and cross-plaintiff in error, vs. Augustus W. Boggs and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, defendants and cross-defendants in error, a manifest error hath happened to the great damage of the said The United States of America, said cross-plaintiff in error, as by the complaint appears:

We being willing that error, if any hath been, should be duly corrected and full and speedy justice

done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the Courtroom of said Court in the Postoffice Building, in the city of San Francisco, State of California, together with this Writ, so that you have the same at the said place before the said Justices on the 15th day of February next, that the record and proceedings aforesaid being inspected, the said Justices of said Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 17th day of January, in the year of our Lord, one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-fifth.

[Seal]

WM. M. VAN DYKE,
Clerk of the United States Circuit Court for the
Ninth Circuit, Southern District of California.

Allowed by:

OLIN WELLBORN,
District Judge.

[Endorsed]: (Original.) No. 1399 (Civil). In the Circuit Court of the United States, Ninth Circuit, Sou. Dist. of California, Sou. Div. The United States of America, Plaintiff and Cross-Plaintiff in

Error, vs. Augustus W. Boggs et al., Defendants and Cross-Defendants in Error. Writ of Error. Filed Jan. 17, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

Citation (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to Augustus W. Boggs, Defendant in Error, and to H. W. Nesbitt, Esquire, His Attorney, and to The United States Fidelity and Guaranty Company of Baltimore, Maryland, a Corporation, Defendant in Error, and to Gray, Barker, Bowen, Allen, Van Dyke and Jutten, and Wm. A. Bowen, Esquire, Attorneys for said Corporation, Greeting:

You are hereby cited and admonished to appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a Cross-writ of Error filed in the Clerk's office of the Circuit Court of the United States, Ninth Judicial Circuit, for the Southern District of California, Southern Division, wherein The United States of America is cross-plaintiff in error, and yourself, the said Augustus W. Boggs and The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, are cross-defendants in error, to show cause, if any there be, why the judgment in said Writ of Error mentioned should not be corrected and speedy justice

should not be done to the parties in that behalf.

Witness the Honorable EDWARD D. WHITE, Chief Justice of the United States of America, this 17th day of January, A. D. 1911, and of the Independence of the United States the one hundred and thirty-fifth.

OLIN WELLBORN,
United States District Judge for the Southern District of California.

[Seal] Attest: WM. M. VAN DYKE,
Clerk U. S. Circuit Court, Judicial Circuit, Southern District of California, Southern Division.

Service of the within and foregoing Citation is hereby admitted by receipt of a copy thereof this 18th day of January, 1911.

HENRY W. NISBET,
Attorneys for Augustus W. Boggs, Cross-defendant in Error.

GRAY, BARKER, BOWEN, ALLEN, VAN
DYKE & JUTTEN,
Attorneys for The United States Fidelity and Guaranty Company of Baltimore, Maryland, a Corporation, Cross-defendant in Error.

By WILLIAM A. BOWEN.

United States of America,
Southern District of California,—ss.

W. L. Brett, being first duly sworn, upon oath deposes and says that he is now, and was on the 18th day of January, 1911, a stenographer in the office of the United States Attorney for the Southern District of California; that on the said 18th day of Jan-

uary, 1911, affiant served the annexed and foregoing Citation on writ of error upon Augustus W. Boggs, one of the defendants in error therein named, at the city of Los Angeles, within the Southern District of California, by then and there personally delivering to and leaving with the said Augustus W. Boggs, personally, a copy of the said annexed and foregoing Citation.

W. L. BRETT.

Subscribed and sworn to before me this 18th day of February, 1911.

[Seal]

WM. M. VAN DYKE,
Clerk U. S. Circuit Court, Southern District of California.

By Harry H. Jones,
Deputy.

[Endorsed]: (Original.) No. 1399 (Civil). In the Circuit Court of the United States, Ninth Circuit, Sou. Dist. of California, Sou. Div. The United States of America, Plaintiff and Cross-plaintiff in Error, vs. Augustus W. Boggs et al., Defendants and Cross-defendants in Error. Citation. Filed Feb. 20, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.

[Answer to Cross-writ of Error (Original).]

The Answer of the Judges of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, Southern Division:

The record and all proceedings of the complaint

whereof mention is made, with all things touching the same, we certify, under the seal of our said Circuit Court to the United States Circuit Court of Appeals for the Ninth Circuit, in a certain schedule to this writ annexed, as within we are commanded.

By the Court:

[Seal]

WM. M. VAN DYKE,
Clerk.

By Chas. N. Williams,
Deputy Clerk.

*In the Circuit Court of the United States, Ninth
Circuit, Southern District of California, South-
ern Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

AUGUSTUS W. BOGGS, and UNITED STATES
FIDELITY AND GUARANTY COMPANY
OF BALTIMORE, MARYLAND (a Corpora-
tion),

Defendants.

**Stipulation [Re Payment of Cost of Transcribing
and Printing Bill of Exceptions].**

IT IS HEREBY STIPULATED AND AGREED,
by and between the plaintiff and the defendant
United States Fidelity & Guaranty Company of
Baltimore, Maryland, that two-thirds of the bill of
exceptions settled by the Court and agreed to by
said parties, for use on the writ of error to be ob-
tained by said defendant, and for use on the writ

of error to be obtained by said plaintiff, was inserted and included in said bill of exceptions at the instance of and for the particular purposes of the said defendant; that one-third thereof was inserted at the instance of and for the particular purposes of said plaintiff, and that in consideration of the stipulation by said defendant that the aforesaid one-third of said bill of exceptions would be included therein for the particular use of said plaintiff on its writ of error, said plaintiff shall pay one-third of the cost of transcribing and printing said bill of exceptions in connection with the review of said case by the Circuit Court of Appeals, and that in case said defendant shall be required to advance the whole [2] cost thereof for the purpose of bringing said case before said Circuit Court of Appeals, before plaintiff shall have paid its one-third of said cost, plaintiff shall immediately on demand, reimburse said defendant to the extent of one-third of the cost of transcribing and printing said bill of exceptions.

This stipulation is made subject to confirmation by the Attorney General of the United States, and the undersigned United States District Attorney shall immediately take measures to procure such confirmation.

Dated December 15th, 1910.

A. I. McCORMICK, (Ho.)

United States District Attorney,

G. RAY HORTON,

Asst. United States District Attorney,

Attorneys for Plaintiff.

The United States of America

GRAY, BARKER, BOWEN, ALLEN, VAN
DYKE & JUTTEN,

Attorneys for Defendant U. S. Fidelity & Guaranty
Co. of Baltimore.

[Endorsed]: No. 1399. In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division. United States of America, Complainant, vs. Augustus W. Boggs and U. S. Fidelity & Guaranty Company, Defendants. Stipulation. Filed Dec. 15, 1910. Wm. M. Van Dyke, Clerk. Chas. N. Williams, Deputy. Gray, Barker, Bowen, Allen, Van Dyke & Jutten, Equitable Bank Building, First and Spring Sts., Los Angeles, Cal., Attorneys for U. S. F. & G. Co. [3]

*In the Circuit Court of the United States, Ninth
Circuit, Southern District of California, South-
ern Division.*

No. 1399 (Civil).

THE UNITED STATES OF AMERICA,
Plaintiff and Cross-plaintiff in Error,

vs.

AUGUSTUS W. BOGGS and THE UNITED
STATES FIDELITY AND GUARANTY
COMPANY OF BALTIMORE, MARY-
LAND (a Corporation),

Defendants and Cross-defendants in Error.

Petition for Cross-writ of Error.

The United States of America, plaintiff in the
above-entitled action, conceiving itself aggrieved by

the decision and judgment of the above-entitled court, rendered, given, made and entered on the 18th day of July, 1910, comes now by A. I. McCormick, United States Attorney for the Southern District of California, and G. Ray Horton, Assistant United States Attorney for the Southern District of California, the attorneys for said plaintiff, and petitions said Court for an order allowing said plaintiff to prosecute a Cross-writ of Error to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, for the reasons and to the extent specified in its Assignment of Errors filed herewith.

The said plaintiff further prays that the Bill of Exceptions heretofore, to wit, on the 15th day of December, 1910, [4] filed by the defendant, The United States Fidelity and Guranty Company of Baltimore, Maryland, a corporation, and a proper transcript of the record, proceedings and papers upon which the said decision and judgment was rendered, given, made and entered as aforesaid, duly authenticated, to be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, upon the Writ of Error heretofore sued out by said defendant, The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, may be used by it (this plaintiff) on the hearing and for all purposes of this Cross-writ of Error the same as if such Bill of Exceptions and transcript of the

The United States of America

record were filed by it (this plaintiff).

Dated this 17th day of January, 1911.

THE UNITED STATES OF AMERICA.

A. I. McCORMICK,

United States Attorney for the Southern District
of California,

And G. RAY HORTON,

Assistant United States Attorney for the Southern
District of California,

Attorneys for Plaintiff.

[Endorsed]: (Original.) No. 1399 (Civil).
In the Circuit Court of the United States, Ninth
Circuit, for the Sou. Dist. of California, Sou. Div.
The United States of America, Plaintiff, and Cross-
plaintiff in Error, vs. Augustus W. Boggs et al.,
Defendants and Cross-defendants in Error. Peti-
tion for Cross-writ of Error. Filed Jan. 17, 1911.
Wm. M. Van Dyke, Clerk. By Chas. N. Williams,
Deputy Clerk. [5]

*In the Circuit Court of the United States, Ninth
Circuit, Southern District of California, South-
ern Division.*

No. 1399 (Civil).

THE UNITED STATES OF AMERICA,

Plaintiff and Cross-plaintiff in Error,

vs.

AUGUSTUS W. BOGGS and THE UNITED
STATES FIDELITY AND GUARANTY
COMPANY OF BALTIMORE, MARYLAND
(a Corporation), Defendants and Cross-de-
fendants in Error.

Assignment of Errors.

The plaintiff, The United States of America, by its attorneys, A. I. McCormick, Esquire, the United States Attorney for the Southern District of California, and G. Ray Horton, Esquire, Assistant United States Attorney for the Southern District of California, in connection with its Petition for Cross-writ of Error herein, says that the decision and judgment rendered and entered by the said Court on the 18th day of July, 1910, in the above-entitled case No. 1399, is erroneous, and that in the record and proceedings in said cause there is manifest error, in the following particulars:

FIRST: The said Circuit Court of the United States for the Southern District of California, Southern Division, erred in failing and refusing to find as a fact, and conclude as a matter of law, and pronounce as a judgment of said Court, that plaintiff, in addition to the relief granted by said decision and judgment, is also entitled to interest at seven per cent per [6] annum on the sum of \$6,500.00 from the first day of September, 1905, to date of payment. And herein the Court erred, because said sum of \$6,500.00 is the penal sum (yet unpaid) specified in the surety bond given by defendant, The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, on condition of no breach of a certain contract dated February 23, 1905, between plaintiff and defendant, Augustus W. Boggs, when, as a fact duly found by said Court, said contract was breached by the said defendant,

Augustus W. Boggs, on and before said first day of September, 1905.

2d. That said Court erred in failing and refusing to conclude as a matter of law from the findings as found by said Court, and pronounce and decree as the judgment of said Court, that this plaintiff in error, The United States of America, in addition to the relief granted by said decision and judgment as rendered, was and is also entitled to interest on the sum of \$6,500.00 from the first day of September, 1905, to the date of payment of same, at the rate of seven per cent per annum.

And herein the Court erred because in said findings of fact as found by said Court, it affirmatively appears that said sum of \$6,500.00 is the penal sum specified in the said bond given by the said defendant in error herein, The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, on condition of no breach of that certain contract mentioned in said findings, dated February 23, 1905, between this plaintiff in error and the defendant in error herein, Augustus W. Boggs, when as a fact duly found by said Court said contract does breach and complete default made therein by said Augustus W. Boggs, on and before said first day of September, 1905.

3d. The Court erred in failing and refusing to find as a fact and conclude as a matter of law and pronounce as a judgment of said Court, that plaintiff in addition to the relief granted by said decision and judgment, is also entitled to recover the [7] difference between the contract price under the said

building contract between plaintiff and the defendant, Augustus W. Boggs, and the contract price under the building contract dated January 22, 1907, between plaintiff and one James H. Owen.

And herein the Court erred, because said contracts and the other evidence in this case furnish definitely-ascertained factors as a basis for accurate mathematical calculation in liquidating the loss and damage suffered by this plaintiff on account of defendant Boggs' breach of his said contract with plaintiff on and before the first day of September, 1905, as aforesaid.

4th. That said Court erred in holding and finding as a part of Finding No. XXIV of the Findings of said Court, that by reason of the time elapsing between the date of the default and breach of the said contract between this plaintiff in error and the said Augustus W. Boggs, on the part of said Boggs, and the time of entering into the contract between this plaintiff in error and the said James H. Owen, and the change in prices in the meantime, a comparison between the two contracts furnishes no basis for estimating the damages sustained by this plaintiff in error in this case by reason of the default and breach of said defendant in error, Augustus W. Boggs.

And herein the Court erred because the evidence showed clearly and conclusively the difference between said two contracts and the work done and materials furnished thereunder, and also showed clearly and conclusively the precise amount of money necessarily expended by, and the cost to this

plaintiff in error in furnishing the precise materials and doing the precise labor which said Boggs agreed to do under his said contract, but which he, the said Boggs, wilfully failed and neglected to do; and the evidence further clearly and conclusively showed wherein the work and materials done and furnished under the contract with the said James H. Owen differed from or added to that called for by the [8] said contract with said Augustus W. Boggs and also clearly showed the reasonable value and the precise cost of said differences and additions, and it became and was a mere matter of mathematical calculation to ascertain the cost to the Government of procuring the precise work and materials called for by said contract with said Augustus W. Boggs.

5th. The Court erred in failing to conclude as a matter of law and to pronounce as a judgment of said Court, from the facts as found in the said findings of said Court, and especially from the facts as found in said Finding No. XXIV of the findings of said Court, that this plaintiff in error, The United States of America, in addition to the relief granted by said decision and judgment, was and is entitled to recover from said defendants in error herein, the sum of \$2,191.00, being the difference between the contract price under the said building contract between plaintiff in error and the said defendant in error, Augustus W. Boggs, and the contract price under the building contract dated January 22, 1907, between this plaintiff in error and the said James H. Owen, after deducting from said contract price of said contract between this plaintiff in error and

vs. Augustus W. Boggs et al.

15

said James H. Owen, the sum of \$1,700.00, being the amount and value and cost of the work done and materials furnished under said contract with said James H. Owen, which was different from or in addition to the work, labor and materials called for in the said contract with the said Augustus W. Boggs.

And herein the Court erred because it affirmatively appears from the facts as found by said Court in said findings of said Court, and the said Court did find that by reason of the default of said defendant in error, Boggs, this plaintiff in error was compelled to and did necessarily expend in procuring that to be done which the said Boggs in his said contract with this plaintiff in error had agreed to do at the cost of \$14,900.00, the [9] same being \$2,191.00 in excess of the price at which Boggs agreed to do the same; and it affirmatively appears from said facts as found by said Court, and especially from said finding No. XXIV, that any and all differences, changes or additions between the work and materials called for under the said contract with the said Augustus W. Boggs, and the work, labor and materials called for and furnished under the said contract with the said James H. Owen, together with the value and cost thereof, were clearly and definitely ascertained, and it then became and was a mere matter of mathematical calculation to ascertain the necessary cost to this plaintiff in error, The United States of America, of procuring the precise work, labor and materials called for by said contract with said Augustus W. Boggs.

WHEREFORE, this plaintiff in error prays that

the said judgment be corrected in and as to the said particulars.

Dated January 17th, 1911.

THE UNITED STATES OF AMERICA,

A. I. McCORMICK,

United States Attorney for the Southern District
of California,

G. RAY HORTON,

Assistant United States Attorney for the Southern
District of California,

Attorneys for said Plaintiff in Error.

[Endorsed]: (Original). No. 1399 (Civil). In the Circuit Court of the United States, Ninth Circuit, for the Sou. Dist. of California, Sou. Div. The United States of America, Plaintiff and Cross-plaintiff in Error, vs. Augustus W. Boggs et al., Defendants and Cross-defendants in Error. Assignment of Errors. Filed Jan. 17, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk.
[10]

In the Circuit Court of the United States, Ninth Circuit, Southern District of California, Southern Division.

No. 1399 (Civil).

THE UNITED STATES OF AMERICA,

Plaintiff and Cross-plaintiff in Error,

vs.

AUGUSTUS W. BOGGS and THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF BALTIMORE, MARYLAND (a Corporation),
Defendants and Cross-defendants in Error.

Order Allowing Cross-writ of Error, etc.

Upon reading and filing the petition of The United States of America, plaintiff herein, praying for the allowance of a Cross-writ of Error in the above-entitled action, returnable before the United States Circuit Court of Appeals for the Ninth Circuit, and upon reading and filing the Assignment of Errors presented with said petition, and on motion of A. I. McCormick, Esquire, United States Attorney for the Southern District of California, and one of the attorneys for plaintiff herein,

IT IS HEREBY ORDERED that the said petition be and the same is hereby allowed and granted; and,

IT IS FURTHER ORDERED that a Cross-writ of Error be and the same is hereby allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the decision and judgment heretofore entered herein, and that said Cross-writ of Error be issued by the Clerk of the Circuit Court of this District under the seal of the said Circuit Court as required by law; and, [11]

IT IS FURTHER ORDERED that a certified transcript of the record, proceedings and papers herein, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and that the Bill of Exceptions heretofore, to wit, on the 15th day of December, 1910, filed by the defendant, The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, and the authenticated transcript of the record, proceed-

ings and papers herein, to be sent to the said United States Circuit Court of Appeals for the Ninth Circuit, upon the Writ of Error heretofore sued out by said defendant, The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, on and in connection with the Writ of Error heretofore granted by this Court to said defendant herein, may be used on both Writ of Error and Cross-writ of Error herein alike, and that the Cross-writ of Error of this plaintiff shall be heard thereon in the same manner as if such record had been filed separately by the plaintiffs in error in both writs of error, and that a true copy of this petition and order and the Assignment of Errors filed therewith, and of all other documents and proceedings in the case not included in the said transcript of record, be sent to the United States Circuit Court of Appeals under the seal of this court and the hand of the Clerk thereof, as provided by law.

So ordered this 17th day of January, 1911.

OLIN WELLBORN,

Judge of the United States District Court in and for the Southern District of California.

[Endorsed]: (Original.) No. 1399. (Civil.) In the Circuit Court of the United States, Ninth Circuit, for the Sou. Dist. of California, Sou. Div. The United States of America, Plaintiff and Cross-plaintiff in Error, vs. Augustus W. Boggs et al., Defendants and Cross-defendants in Error. Order Allowing Cross-writ of Error. Filed Jan. 17, 1911. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [12]

[Certificate of Clerk U. S. Circuit Court to Record.]

*In the Circuit Court of the United States of America,
of the Ninth Judicial Circuit, in and for the
Southern District of California, Southern Division.*

No. 1399.

THE UNITED STATES OF AMERICA,

Plaintiffs,

vs.

AUGUSTUS W. BOGGS and THE UNITED
STATES FIDELITY AND GUARANTY
COMPANY OF BALTIMORE, MARY-
LAND (a Corporation),

Defendants.

I, Wm. M. Van Dyke, Clerk of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Southern District of California, do hereby certify the foregoing twelve (12) typewritten pages, numbered from 1 to 12, both inclusive, and comprised in one volume, to be a full, true and correct copy of the petition for writ of error, order allowing writ of error, assignment of errors and stipulation as to transcript, filed by and on behalf of the plaintiffs in the above-entitled cause as cross-plaintiffs in error herein, and that the same together with the return to the writ of error filed in the United States Circuit Court of Appeals for the Ninth Circuit, by the defendant The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, as plaintiff in error,

on and in connection with the writ of error heretofore granted unto said defendant The United States Fidelity and Guarenty Company of Baltimore, Maryland, a corporation, herein, constitute the return to the cross-writ of error allowed the said plaintiffs The United States of America returnable before the [13] United States Circuit Court of Appeals for the Ninth Circuit, in said cause.

I do further certify that the cost of the foregoing record is \$13.95, the amount whereof is to be paid me by the United States of America, cross-plaintiffs in error in said cause.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court of the United States of America, of the Ninth Judicial Circuit in and for the Southern District of California, Southern Division, this 29th day of April, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States of America the one hundred and thirty-fifth.

[Seal]

WM. M. VAN DYKE,
Clerk of the Circuit Court of the United States of America of the Ninth Judicial Circuit in and for the Southern District of California.

By Chas. N. Williams,
Deputy Clerk. [14]

[Endorsed]: No. 1982. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Cross-plaintiff in Error, vs. Augustus W. Boggs, and The United States Fidelity and Guaranty Company of Baltimore, Maryland (a Corporation), Cross-defendants in Error. Transcript of Record. Upon Cross-writ of Error to the United States Circuit Court for the Southern District of California, Southern Division. Filed May 1, 1911.

F. D. MONCKTON,
Clerk.

[Order Enlarging Time to April 1, 1911, to Docket Cause, etc.]

United States Circuit Court of Appeals, for the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Cross-plaintiff in Error,
vs.

AUGUSTUS W. BOGGS et al.,
Cross-defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said cross-plaintiff in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same hereby is, enlarged and extended to and including the 1st day of April, 1911.

Dated at Los Angeles, California, February 10th, 1911.

OLIN WELLBORN,
United States District Judge, Southern District of
California.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Cross-plaintiff in Error, vs. Augustus W. Boggs et al., Cross-defendants in Error. Order Extending Time to File Record. Filed Feb. 11, 1911. F. D. Monckton, Clerk.

[Order Enlarging Time to May 1, 1911, to Docket Cause, etc.]

*United States Circuit Court of Appeals, for the
Ninth Circuit.*

THE UNITED STATES OF AMERICA,
Cross-plaintiff in Error,
vs.

AUGUSTUS W. BOGGS et al.,
Cross-defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said cross-plaintiff in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same hereby is, enlarged and extended to and including the 1st day of May, 1911.

Dated at Los Angeles, California, March 31st, 1911.

OLIN WELLBORN,
Judge.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Cross-plaintiff in Error, vs. Augustus W. Boggs et al., Cross-defendants in Error. Order Extending Time to File Record. Filed Apr. 1, 1911. F. D. Monekton, Clerk.

[Order Enlarging Time to May 20, 1911, to Docket Cause, etc.]

United States Circuit Court of Appeals, for the Ninth Circuit.

THE UNITED STATES OF AMERICA,
Cross-plaintiff in Error,
vs.

AUGUSTUS W. BOGGS et al.,
Cross-defendants in Error.

Good cause appearing therefor, it is hereby ordered, that the time heretofore allowed said cross-plaintiff in error to docket said cause and file the record thereof, with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, be, and the same hereby is, enlarged and extended to and including the 20th day of May, 1911.

Dated at Los Angeles, California, April 26th, 1911,
OLIN WELLBORN,
Judge.

[Endorsed]: No. —. United States Circuit Court of Appeals for the Ninth Circuit. Filed Apr. 27, 1911. F. D. Monckton, Clerk.

No. 1982. United States Circuit Court of Appeals for the Ninth Circuit. Three Orders Enlarging Time to File Record Thereof and to Docket Cause. Refiled May 1, 1911. F. D. Monckton, Clerk.

431-2 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY
of Baltimore, Maryland, a corporation, plaintiff in
error,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR,
and

THE UNITED STATES OF AMERICA, CROSS PLAINTIFF IN
error,

vs.

AUGUSTUS W. BOGGS ET AL., CROSS DEFENDANTS IN ERROR.

No. 1982.

*Proceedings had in the United States Circuit Court of Appeals for
the Ninth Circuit.*

433 United States Circuit Court of Appeals for the Ninth Circuit.

At a stated term, to wit, the October term, A. D. 1911, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and county of San Francisco, in the State of California, on Tuesday, the third day of October, in the year of our Lord one thousand nine hundred and eleven.

Present: Honorable William B. Gilbert, circuit judge; honorable Erskine M. Ross, circuit judge; honorable Charles E. Wolverton, district judge.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY
of Baltimore, Maryland, a corporation, plaintiff in
error,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR,
and

THE UNITED STATES OF AMERICA, CROSS PLAINTIFF IN
error,

vs.

AUGUSTUS W. BOGGS ET AL., CROSS DEFENDANTS IN ERROR.

No. 1982.

Order of submission.

Ordered, above-entitled cause upon the writ of error and upon the cross writ of error therein argued by Mr. William H. Bowen, counsel for the plaintiff in error, and the cross defendants in error, and by Mr. United States Attorney A. I. McCormick, counsel for the defendant in error and the cross plaintiff in error, and submitted to the court for consideration and decision.

434 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF Baltimore, Maryland (a corporation), plaintiff in error,	} No. 1982.
<i>vs.</i> THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.	

[Opinion, U. S. Circuit Court of Appeals.]

Upon writ of error to the United States Circuit Court for the Southern District of California, Southern Division.

Before Gilbert and Ross, circuit judges, and Wolverton, district judge.

The question in this case is whether the surety on a contractor's bond, conditioned for his performance of a contract for the erection of a stone mess hall and kitchen at the Rice Station Indian School, in the then Territory of Arizona, was released by occurrences happening subsequent to the entering by the contractor upon the performance of the contract.

By the contract the contractor, who was one Augustus W. Boggs, agreed to furnish all the labor and materials and do and perform all of the work required to construct and complete the buildings mentioned in accordance with certain plans, drawings, and specifications annexed to and made a part of the contract. It was agreed that the entire work should be completed and turned over to the Government on or before September 1, 1905, and that, in the event of the contractor's failure or refusal so to do, twenty dollars a day should be deducted from the contract price for each and every day the completion and delivery of the buildings should be delayed beyond the stipulated time. The Government reserved the right to at any time make "changes, alterations, or omissions from or additions to the work and materials herein provided for, the valuation of such work and materials, if not agreed upon, to be determined on the basis of the contract unit of value of material and work referred to, or, in the absence of such unit of value, on prevailing market rates, which market rates, in the case of dispute are to be determined by "the Commissioner of Indian Affairs, whose decision was made binding upon both parties. The contract further provided that no claim for damages on account of such changes or for anticipated profits should be made or allowed, and that the contractor should not be allowed any additional compensation for labor or material "unless he receives written authority from the Commissioner of Indian Affairs, and the price agreed upon before execution of the work; that no addition to or omission from the work herein specifically provided for shall make void or affect the other provisions or covenants of this contract, but the difference in the cost

thereby occasioned, as the case may be, shall be added to or
436 deducted from the amount of the contract; and that in the
absence of any express agreement or provision to the contrary
no addition to or omission from the work herein specifically provided
for shall be construed to extend the time fixed herein for the final
completion of the work."

The agreement further provided that if the contractor should fail
to complete the work or any part thereof in accordance with the con-
tract and within the stipulated time, or should fail to prosecute the
work with such diligence as in the judgment of the Government
would insure its completion within the stipulated time, the Govern-
ment might withhold all payments for work in place until the final
completion and acceptance of the work, and "is authorized and em-
powered, after eight days' notice thereof, in writing, to the party of
the second part, and the said party of the second part having failed
to take such action within the said eight days as will, in the judg-
ment of the party of the first part, remedy the default for which
said notice was given, to take possession of the said work in whole
or in part and of all machinery and tools employed thereon and all
materials belonging to the said party of the second part delivered
on the site, and, at the expense of said party of the second part, to
complete or have completed the said work, and to supply or have
supplied the labor, materials, and tools of whatever character neces-
sary to be purchased or supplied by reason of the default of the said
party of the second part; in which event the said party of the second
part and his sureties on the bond to be given for the faithful per-
formance of this agreement shall be further liable for any damages
incurred through such default and any and all other breaches of this
contract."

437 The contract further provided that the Government should
pay the contractor "on the presentation of proper receipts or
vouchers in duplicate to the Commissioner of Indian Affairs, the sum
of twelve thousand seven hundred nine no-100 (\$12,709.00) dollars, in
lawful money of the United States, in consideration of the herein
recited covenants and agreements made by the party of the second
part, as follows: Eighty (80) per centum of the value of the work
executed and actually in place to the satisfaction of the party of the
first part at the expiration of each thirty (30) days during the prog-
ress of the work, the amount of each payment to be computed upon
the actual amount of labor and materials expended during the said
period of thirty (30) days for which partial payment is to be made
(the said value to be ascertained by the party of the first part), and
the balance thereof will be retained until the completion of the entire
work and the approval and acceptance of the same by the party of
the first part, which amount shall be forfeited by the said party of
the second part in the event of the nonfulfillment of this contract,
it being expressly covenanted and agreed that said forfeiture shall
not relieve the party of the second part from liability to the party of

the first part for any and all damages sustained by reason of any breach of this contract."

The complaint filed in the case alleged the commencement of the work contracted for and the making by the Government of two payments on account, one of \$4,356.24, made on the 10th of June, 1905, and the other of \$3,539.16, made on the 21st of July of the same year,

and that no part of those sums has been repaid, and it alleged
438 various subsequently discovered fraudulent practices on the part of the contractor, and also various other failures on his part to comply with the provisions of the contract and various efforts by the Government authorities to get the contractor to remedy such failures, defects, and defaults without success, which neglect, failure, and refusal on his part, the complaint alleged, continued to September 1, 1905; that notwithstanding those facts Boggs continued in possession of the work until November 4, 1905, on which day the whole of it, so far as then performed, was, through his fault and negligence, destroyed by fire; that subsequently, to wit, about December 28, 1905, the Government took possession of the premises and has even since remained in possession thereof; that thereafter and pursuant to proceedings regularly had and taken by the plaintiff, acting through its Commissioner of Indian Affairs, the plaintiff entered into a contract with one James H. Owen "for the construction of said stone mess hall and kitchen at said Rice Station Indian School in all respects as required by said contract with the said Augustus W. Boggs as hereinabove set forth, except as to the time of the completion thereof, for the sum of sixteen thousand six hundred (\$16,600.00) dollars, which said last-mentioned sum said plaintiff had been required to pay for the purpose of securing the completion of the said work agreed by said Augustus W. Boggs, under and by the terms of said contract with him hereinabove referred to, to be by him completed as aforesaid"; that after the 4th day of November, 1905, and prior to the entering into said contract with said James H. Owen, the plaintiff duly advertised for bids for the construction
439 of the said mess hall and kitchen "in accordance with the same terms and specifications as contained in said contract with said defendant, Augustus W. Boggs"; that certain bids were received in response to that advertisement, of which bids so received the lowest was the bid of the said Owen "agreeing to construct said stone mess hall and kitchen in all respects as required by said contract with said defendant, Augustus W. Boggs, for the said sum of sixteen thousand and six hundred (\$16,600.00) dollars, which said sum was a reasonable price to be paid for and was and is the reasonable value of the said construction of said stone mess hall and kitchen in accordance with the contract with the same James H. Owen."

The complaint further alleges that by reason of Boggs' failure and refusal to construct and complete the structures contracted for by him, the plaintiff was obliged to and did construct and equip a laundry building for use at the said Rice Station Indian School at a

cost of \$4,339.10, which would not have been required had the mess hall and kitchen been constructed and completed by Boggs as called for by his contract. The prayer of the complainant was for judgment for damages alleged to have accrued to the plaintiff by Boggs' default.

Except as to its execution of the bond sued on and the jurisdictional averments, the separate answer of the surety company (plaintiff in error here) put in issue the material allegations of the complaint. The cause was tried by stipulation of the respective parties before the court without a jury.

The court found as facts, among other things, the making of
440 the contract between the plaintiff and Boggs, and the execution

by the surety company of the bond for the faithful performance by the contractor of his obligations, the entry of Boggs upon the performance of the contract on or about the 12th of April, 1905, and his subsequent failure to comply with the provisions of the contract in many particulars set out in the findings, both as respects material and workmanship; that during the progress of the work the plaintiff made to Boggs the two payments mentioned, no part of which has ever been repaid; that on the 1st day of September, 1905, Boggs had failed to complete the work in accordance with the provisions of the contract or within the time therein specified; that on the 3rd day of October, 1905, Boggs caused his interest in the mess hall and kitchen to be insured; "that on or about the 27th day of October, 1905, the plaintiff rejected the work done, materials furnished, and building thereby and thereof constructed as previously offered for acceptance by the said Augustus W. Boggs"; that on November 4, 1905, while the work, material, and structures were still in the possession of Boggs, all thereof were completely destroyed by fire; that on the 28th day of December, 1905, the plaintiff, pursuant to the terms of the contract and because of the failure and refusal of Boggs to perform its terms and to complete and turn over the buildings as therein required, took possession of the premises and directed Boggs to leave the Indian reservation, where the buildings had been located, which he did, since which time the plaintiff has been continuously in the possession thereof; that at the time Boggs was so ordered to leave the premises he had "belonging to him and located upon said

441 premises certain building materials, tools, and implements of the reasonable value of \$2,418.58; that all of said materials, tools, and implements as aforesaid, were confiscated and seized by plaintiff, although the same then and there belonged to Augustus W. Boggs, as aforesaid; that no part of the said materials, tools, and implements, as aforesaid, were ever returned to the defendants herein, or either of them, nor was any part of the value thereof ever paid to the defendants or either of them; that on the contrary all of said materials, tools, and implements, as aforesaid, were kept, retained, and used by the plaintiff."

The 23rd and 24th findings of fact are as follows:

"That it is not true that said plaintiff did not comply with the terms, covenants, and agreements in said contract specified, but it is true that plaintiff has duly and regularly performed all of the terms, conditions, and obligations of said contract on its part to be performed. It is not true that plaintiff without the knowledge or consent of said defendants, or either of them, or at all, or in violation of the terms or conditions of said bond, or at all, changed or abrogated the terms of said contract in any particular. It is not true that said plaintiff without the knowledge or consent of the defendants, or either of them, or at all, extended the time of the performance of said contract for the said Augustus W. Boggs, otherwise or at all. It is not true that the failure and delay of the said Augustus W. Boggs to complete the said mess hall and kitchen within the period of time prescribed by said contract was by or with the consent of the

442 said plaintiff. It is not true that the said plaintiff without the knowledge or consent of the defendants, or either of them, further violated, or violated at all, the terms or conditions of said contract either by building or causing to be built the said stone mess hall and kitchen on or along different lines than those provided for in said contract or that plaintiff caused said stone mess hall and kitchen to be built or constructed in violation of or contrary to the plans, drawings, and specifications made a part of said contract. It is not true that under or pursuant to the directions of plaintiff in the construction of said stone mess hall and kitchen by said defendant, Augustus W. Boggs, said work was improperly done or that plaintiff caused the said stone mess hall and kitchen to be constructed by said defendant, Augustus W. Boggs, improperly or in violation of the terms and specifications agreed upon in said contract. It is not true that through the act, or any act, of plaintiff herein the consideration for the bond mentioned in said complaint has wholly failed, or failed at all, or that the same is null and void and without effect.

"That on or about the 8th day of December, 1906, plaintiff, acting by and through the then Commissioner of Indian Affairs, advertised for bids to be received on or before January 16, 1907, for the construction of a stone mess hall and kitchen at said Rice Station Indian School; that certain bids were received in response to said advertisement; that of said bids so received the lowest received was the bid of one James H. Owen, of Los Angeles, California; that on the 22nd day of January, 1907, in pursuance of said bid said

443 James H. Owen entered into a written contract with plaintiff for the construction of a stone mess hall and kitchen for the sum of \$16,600 on the site occupied by the building theretofore constructed by the said Augustus W. Boggs; that the said sum of \$16,600 was paid by the plaintiff to the said James H. Owen under said contract for the construction of said building thereunder in lieu of the stone mess hall and kitchen agreed to be built for and delivered to plaintiff by said Augustus W. Boggs under and by the

terms of said contract with him, heretofore referred to, to be by him completed as aforesaid; that the said James H. Owen constructed the building aforesaid according to the contract between himself and plaintiff, and in accordance with the plans and specifications thereunto attached; that the reasonable value of the structure built by the said James H. Owen under the contract, plans, and specifications between himself and plaintiff was \$16,600 at the time the same was constructed; that the aforesaid contract, plans, and specifications between plaintiff and the said James H. Owen were different in many substantial respects from the contract, plans, and specifications between plaintiff and the said Augustus W. Boggs; that the building required to be erected and actually erected by the said James H. Owen under his contract, plans, and specifications was different in many substantial respects from the building required to be erected by the said Augustus W. Boggs under his contract, plans, and specifications; that \$1,200 of the contract price required to be paid and actually paid to the said James H. Owen, under his contract, applied to work wholly outside of the work provided for in the contract
444 between the said Augustus W. Boggs and plaintiff; that \$500 of the aforesaid contract price required to be paid and actually paid to the said James H. Owen under his contract by plaintiff was for work and materials in excess of what was embraced and included in the contract between the said Augustus W. Boggs and plaintiff; that the cost of labor and building supplies was different in 1907 from their cost in 1905, and that plaintiff waited from the 28th day of December, 1905, to the 22nd day of January, 1907, before entering into a new contract for the construction of said building, and that by reason of the lapse of time and the changes in prices in the meantime, a comparison between the two contracts furnishes no basis for estimating the plaintiff's damages in this case."

Judgment was thereupon entered against the defendants, but for a less amount than the plaintiff claimed to be entitled to, resulting in not only a writ of error sued out by the surety company but a cross writ of error sued out by the United States, both of which are now for consideration.

Ross, Circuit Judge, after stating the case:

The findings, as well as the evidence, show many failures on the part of the contractor to perform his obligations under the contract, including his refusal to remedy defects pointed out to him by representatives of the Government and his failure to remedy such defects within the stipulated time after the serving upon him of the required notice, and also his failure to complete the work contracted for within the stipulated time. The taking of possession by the Govern-
445 ment of the premises, together with all materials, tools, and machinery thereon belonging to the contractor, was therefore fully authorized by the contract; but for the purpose, as is expressly declared in the contract, "at the expense of said party of the

second part, to complete or have completed the said work, and to supply or have supplied the labor, materials, and tools of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event," proceeds the contract, "the said party of the second part and his sureties on the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this contract."

While the complaint alleges that the subsequent contract made by the Government with Owen for the construction of the mess hall and kitchen which Boggs had failed to build and complete as he had agreed to do, was, except as to the time of completion thereof, based upon the same plans and specifications, and was in all respects the same as the Boggs' contract, the findings of fact made by the court below, as well as the evidence in the case, show such allegations to be far from true. The court expressly finds, what the evidence abundantly shows, that the contract between the Government and Owen and the plans and specifications upon which it was based, "were different in many substantial respects from the contract, plans, and specifications between plaintiff and the said Augustus W. Boggs;

446 that the building required to be erected and actually erected by the said James H. Owen under his contract, plans, and specifications was different in many substantial respects from the building required to be erected by the said Augustus W. Boggs under his contract, plans, and specifications; that \$1,200 of the contract price required to be paid and actually paid to the said James H. Owen under his contract applied to work wholly outside of the work provided for in the contract between the said Augustus W. Boggs and plaintiff; that \$500 of the aforesaid contract price required to be paid and actually paid to the said James H. Owen under his contract by plaintiff was for work and materials in excess of what was embraced and included in the contract between the said Augustus W. Boggs and plaintiff; that the cost of labor and building supplies was different in 1907 from their cost in 1905; and that plaintiff waited from the 28th day of December, 1905, to the 22nd day of January, 1907, before entering into a new contract for the construction of said building, and that by reason of the lapse of time and the changes in prices in the meantime a comparison between the two contracts furnishes no basis for estimating the plaintiff's damages in this case."

The Government, pursuant to the terms of the contract between it and Boggs, by reason of his default, took from him the possession of the premises, as well as all of his materials, machinery, and tools thereon for the purpose of having, at his expense, his contract fulfilled; and for that his surety bond itself, but not for the fulfillment of any essentially different contract. It is true that by its contract with Boggs the Government reserved to itself the right "to
447 make changes, alterations, or omissions from or additions

to the work and materials herein provided for"; that is to say, changes in, additions to, or omissions from the work covered by the plans and specifications of the contract. This is plainly shown by the subsequent provisions of article 3 of the Boggs' contract, in which the reservation occurs. It is, in the same clause, followed by these provisions: "The valuation of such work and materials (that is to say, such work and materials as might be embraced by the authorized changes and alterations) if not agreed upon, to be determined on the basis of the contract unit of value of material and work referred to or, in the absence of such unit of value, on prevailing market rates, which market rates, in the case of dispute, are to be determined by the said Commissioner of Indian Affairs, whose decision with reference thereto shall be binding upon both parties; that no claim of damages on account of such changes or for anticipated profits shall be made or allowed; that the party of the second part (Boggs) shall not be allowed any additional compensation for labor or material unless he receives written authority from the Commissioner of Indian Affairs, and the price agreed upon before execution of the work; that no addition to or omission from the work herein specifically provided for shall make void or affect the other provisions or covenants of this contract, but the difference in the cost thereby occasioned, as the case may be, shall be added to or deducted from the amount of the contract; and that in the absence of any express agreement or provision to the contrary, no addition to or omission from the work herein specifically provided for shall be construed to extend the time fixed herein for the final completion of the work."

That reservation, in our opinion, affords no ground for holding the Government entitled to make a substantially different contract with a third party at the expense of the former contractor and his surety. And such was the ruling of the Supreme Court in a similar case. In speaking of a like clause in the case of *United States v. Freel*, 186 U. S., 309, 311, 317, the court said:

"Coming, then, to the question of the effect on the responsibility of the surety of the supplemental agreement of August 17, we agree with the Circuit Court and the Circuit Court of Appeals in holding that the alterations thereby caused were beyond the terms of the undertaking of the surety, and extinguishes his liability. The seventh section had in view such changes as might be found advantageous or necessary in the plans and specifications. But the changes called for by the new agreement had no reference to the original plans and specifications, but changed the location of the dry dock, requiring the contractor to make additional excavations and connections with the water, at an increased expense, and gave an increased time of performance."

We do not understand the case just referred to—*United States v. Freel*—to be overruled by the very recent decision of the same court

in the case of *The United States v. McMullen et al.*, decided January 9, 1912.

In the present case not only do the findings show that the contract and the plans and specifications upon which it was based, subsequently made between the Government and Owen, were different in many substantial particulars from the contract for which the plaintiff in error became surety, but that the Government waited more than one year before entering into a new contract, during which time there was such a change in the cost of labor and building supplies as, according to the findings of the trial court, "the two contracts furnishes no basis for estimating the plaintiff's damages."

In the case of *American Bonding Co. v. United States*, 167 Fed., 910, the question here involved was carefully considered by us, and, being satisfied of the correctness of that decision, it is useless for us to pursue the subject further. Boggs' surety is not, in our opinion, liable in this action, for the reason that the Government did not complete Boggs' contract, as it had the right to do, but instead chose to have the structures erected in a substantially different manner, pursuant to the contract made by it with Owen.

It results that the judgment must be reversed and the cause remanded with direction to the court below to enter judgment for the defendant surety company on the findings.

It is so ordered.

(Endorsed:) Opinion. Filed Mar. 22, 1912. F. D. Monckton, clerk.

450 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES FIDELITY & GUARANTY COMPANY OF Baltimore, Maryland (a corporation), plaintiff in error,	} No. 1982.
<i>vs.</i>	
THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.	

[Dissenting opinion of Gilbert, C. J.]

GILBERT, Circuit Judge, dissenting:

The case, as I view it, contains no question of a release of a surety resulting from a change in the contract with the assured as in the case of *United States v. Freel*, 186 U. S., 309, and *American Bonding Co. v. United States*, 167 Fed., 910. No such issue is presented in the complaint and no such defense is pleaded or even remotely suggested in the answer. It is a case of an action for damages for the total failure of a contractor to carry out his contract. The contract, the breach thereof, and the surety's undertaking are established by the findings of the trial court. The only question in the case is as to the measure of the plaintiff's damages. Is the Government by the terms of its contract confined to proof of damages by showing the

cost of constructing a building of the same kind under a new
451 contract, or may it recover damages irrespective of the construction or cost of a new building? It is important to observe the language of the obligation which the plaintiff in error assumed. The contract provided that on default the United States was authorized and empowered to take possession and to complete the work or have it completed, "in which event the said party of the second part and his sureties on the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this contract." These provisions do not limit the Government to merely completing the contract which was entered into with the contractor and thereby establishing by the cost of such second contract the measure of damages for the breach of the first, but the contract authorized the Government to complete the work, and the very wording of the contract is that if the Government should elect to complete the work the surety should be liable for any damages incurred through any breach whatever of the original contract. There is nothing in the contract that deprives the Government of the right to recover damages generally for a total breach thereof. The trial court was of the opinion that the new contract differed so materially as to essential features that it afforded no safe measure of damages for a breach of the first contract, but allowed damages for the breach to the extent of the payments which the Government had made on that contract. In *United States v. Stone, Sand & Gravel Co.*, 177

Fed., 321, the Circuit Court of Appeals for the Fifth Circuit
452 had under consideration the right of the Government to recover against a surety for the total breach of a contract, in a case where a second contract, which varied in some particulars from the first, had been let at an increased cost. The court said: "With reference to the new contract, no recovery is sought on it in this action. And it is not apparent to us how the so-called 'substitutions' complained of can or could affect the rights of the defendants under the original contract."

In the present case, although a building was constructed by the contractor, it was not constructed according to the contract, but was essentially different therefrom, and the work done constituted "a willful and substantial departure from said contract and said plans, drawings, and specifications," and the contractor "willfully, knowingly, purposely, fraudulently, and intentionally failed, neglected, and refused to erect the structure in accordance with the plans and specifications," as found by the trial court. The Government rejected the work done, the materials furnished, and the building thereby and thereof constructed and gave the contractor formal notice to tear down the building and construct another in exact accordance with the specifications. The contractor insured his interest in the building against loss by fire, and while the building was still in his possession it was totally destroyed by fire. During the progress of the work the

contractor in accordance with the terms of his contract was paid on account thereof \$7,895.40, which has not been repaid to the Government, but against which the trial court allowed a set-off for
453 the value of materials belonging to the contractor which the Government confiscated after the destruction of the building.

In *American Bonding Co. v. United States*, supra, the contract differed substantially from that under consideration here. It provided that upon the default of the contractor the United States should have the right to recover from him whatever sums might be expended by it "in completing the said contract in excess of the price herein stipulated to be paid." There was no other provision for the payment of damages. When the new contract was let it so far departed from the first that it was obvious that the cost of its completion could furnish no criterion for determining what would have been the cost of "completing the said contract" first made. In the opinion it was said: "This is not a suit to recover generally whatever damages the United States would have sustained had Axman abandoned his contract, but a suit for damages under the express stipulations of the contract which are set forth in the complaint and made the basis of the action." In brief, the decision gave effect to the rule that if there be in the contract a provision for ascertaining the damages incurred through a violation of any of its provisions the surety has the right to insist on its observance before being held responsible. In *George A. Fuller Co. v. Doyle*, 87 Fed., 687, in a case similar to the case at bar, the court said: "Before plaintiff undertook the work the contract had been broken by Doyle, and plaintiff's rights
454 and Doyle's obligations under it had become fixed. If plaintiff made any changes in the details of the work in the progress of completing it, they were not made as a result of any agreement between it and Doyle, such as usually operates to discharge a surety, and such changes imposed no new or modified obligation upon Doyle. He had already failed to perform his contract and abandoned the work, and plaintiff's cause of action had arisen thereupon, and, in my opinion, the surety's liability is in no manner affected by the fact that plaintiff, while it was doing the very work which Doyle had contracted to do, did, of its motion, some other things for the doing of which no claim is made against Doyle or his surety."

The plaintiff in error contends that the partial payments having been properly made during the progress of the work, the loss thereof constitutes no element of recoverable damages. The general rule is that in an action against a builder for a breach of his contract all damages are recoverable which are the proximate result of the breach. 6 Cyc., 113. The payments made by the Government were totally lost through the default of the contractor. The action is not one to recover money negligently paid, but to recover damages for a breach of the contract. The Government ought not to be, and is not, bound by payments made upon a fraudulent, negligent, or inefficient inspection of work during the progress thereof, when, in fact, the work has

been fraudulently done in willful disregard of the terms of the contract. *Dox v. Postmaster General*, 1 Pet., 318; *Kingston v. Harding* (1892), 2 Q. B. Div., 494; *Glacius v. Black*, 50 N. Y., 145; *Barker v. Nichols*, 31 Pac., 1024. It is only where the contract stipulates in express terms that a certificate of inspection shall be conclusive evidence of compliance with the contract that it is binding, and even in such a case it is held binding only in the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment. *Martinsburg & Potomac R. R. Co. v. March*, 114 V. S., 549. But in this case the contract contained the express provision that partial payments should in no way be considered as an acceptance of any work or material included in the contract.

But in any view of the defenses that may be urged against recovery of damages arising out of payments of installments of the agreed compensation they are of no avail in a case like this, where before the completion of the building according to the plans and specifications and before its acceptance by the Government the building was destroyed. In such a case the loss is that of the contractor, and he is not only denied a recovery of compensation for the work done, but the other party to the contract may recover from him his damages, including the partial payments made as the work progressed. *Tompkins v. Dudley*, 25 N. Y., 272; *School Trustees of Trenton v. Bennett*, 27 N. J. L., 513; *School District No. 1 v. Dauchy*, 25 Conn., 530; *Adams v. Nichols*, 19 Pick., 275; *Stees v. Leonard*, 20 Minn., 494; 30 Am. & Eng. Encyc. of Law, 1249.

(Endorsed:) Dissenting opinion of Judge Gilbert. Filed Mar. 22, 1912. F. D. Monckton.

456 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF
Baltimore, Maryland, a corporation, plaintiff in error,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR,
and

THE UNITED STATES OF AMERICA, CROSS PLAINTIFF IN ERROR,

vs.

AUGUSTUS W. BOGGS AND THE UNITED STATES FIDELITY
and Guaranty Company of Baltimore, Maryland, a cor-
poration, cross defendants in error.

No. 1982.

Judgment U. S. Circuit Court of Appeals.

On writ of error and cross writ of error to the Circuit Court of the United States for the Southern District of California, Southern Division.

The United States vs.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of California, Southern Division, and was duly submitted:

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and hereby is, reversed, and that this cause be, and hereby is, remanded to the District Court of the United States for the Southern District of California, Southern Division, with direction to enter judgment for the defendant surety company on the findings.

(Endorsed:) Judgment. Filed and entered March 22, 1912. F. D. Monckton, clerk.

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1982.

In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES FIDELITY & GUARANTY COMPANY OF
Baltimore, Maryland, a corporation, plaintiff in error,

vs.

UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

Petition of defendant in error, United States of America, for rehearing.

A. I. McCormick, United States attorney; Dudley W. Robinson, assistant United States attorney; Harry R. Archbald, assistant United States attorney, of counsel for defendant in error.

Filed May 27, 1912. F. D. Monckton, clerk.

458 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES FIDELITY & GUARANTY COMPANY OF
Baltimore, Maryland, a corporation, plaintiff in error,

vs.

UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

PETITION OF DEFENDANT IN ERROR, UNITED STATES OF AMERICA, FOR REHEARING.

To the honorable, the judges of the above-named court:

Your petitioner, the United States of America, respectfully petitions this honorable court for a rehearing of this case, and in support thereof submits the following:

Preliminary to a presentation of the points upon which the Government asks for a rehearing, we deem it proper to state that we are not unmindful of the fact that the decision in this case was by

459 a divided court and that several of the points upon which the Government does now and has at all times relied are ably pre-

sented by the learned author of the dissenting opinion. We, of course, must assume from these facts that the court has thoroughly and exhaustively considered at least the points mentioned in the dissenting opinion. It is not our purpose, therefore, to take up the valuable time of the court in a lengthy general discussion of the case in this petition for rehearing. However, there are several pivotal points which we believe the court failed to consider and which points we deem it our duty as representatives of the Government to specifically call to the court's attention in this petition.

A perusal of certain of the findings of the court which are abundantly and conclusively established by the evidence, indeed, without contradiction, discloses the following:

The contractor, Augustus W. Boggs, after entering into the contract for the construction of the stone mess hall and kitchen at Rice, Arizona, never at any time in good faith, substantially or at all, complied or attempted to comply with the terms and conditions of said contract, but, on the contrary, as stated in Finding VI, "willfully, intentionally, and fraudulently disregarded the terms of his contract with plaintiff from the beginning of his operations thereunder and continued in such disregard * * * at all times up to and including the 28th day of December, 1905, and at all times thereafter."

The work done by Boggs constituted and was a willful and substantial departure from said contract and the plans and specifications which were a part thereof, and the result was that on the 1st day of September, 1905, when the building should have been completed, according to the contract, the Government was presented by Boggs with nothing more than a worthless and dangerous structure which could not possibly be made to conform, even substantially, to the contract, except by being totally torn down and an entire new structure erected. The Government refused to accept the building as erected, notified the contractor of such fact, and demanded a building in accordance with the contract, plans, and specifications. Boggs, the contractor, persistently failed to take any action to remedy his default. Things continued in this condition until the 3rd day of October, 1905, when the said Boggs caused the building that he had constructed to be insured, the policy running to himself as beneficiary, and on the 4th day of November, for some cause not specifically shown by the evidence, but through no fault of the Government, and while the building, material, and structure were still in the possession of said Boggs, the whole thereof was completely destroyed by fire and thereafter constituted nothing more than a mass of debris and junk. On the 28th of December, the Government, having given every opportunity to Boggs, and becoming thoroughly convinced of his absolute lack of good faith, took possession of the premises and ordered Boggs and his representatives from the reservation. This court, in its opinion, holds: "The taking of possession by the Government of the premises, together with all

materials, tools, and machinery thereon belonging to the contractor, was therefore fully authorized by the contract * * *." Prior to this time and during the progress of the work performed by 461 Boggs, to wit, on the 10th of June, 1905, and on the 21st of July, 1905, respectively, the Government made two progress payments, aggregating \$7,895.40, to the contractor, Boggs, under the said contract. So, in addition to being deprived of the use and benefit of the building, which the Government had a right to expect to be turned over to it complete and ready for use and occupancy on the 1st of September, 1905, and of having upon its hands nothing more than a mass of the charred remains and débris of what even before the fire was nothing more or less than a worthless structure, it had suffered the loss of practically \$8,000 which it had in good faith paid out to the said contractor.

The Supreme Court of the United States, in *United States v. Behan*, 110 U. S., 338, in discussing a similar case, involving similar circumstances, used this language:

"The claimant has not received a dollar, either for what he did or for what he expended, except the proceeds of the property which remained on his hands when the performance of the contract was stopped. Unless there is some artificial rule of law which has taken the place of natural justice in relation to the measure of damages, it would seem to be quite clear that the claimant ought at least to be made whole for his losses and expenditures. So far as appears, they were incurred in the fair endeavor to perform the contract which he assumed."

Yet this court, in the prevailing opinion, seems to hold that the Government is absolutely foreclosed from recovering in this case one single cent of damages either by reason of the excess cost of 462 the construction of the new building by the contractor, Owen, or by reason of delay caused by Boggs' willful and fraudulent acts, nor is it entitled to recover one cent of the \$7,895.40 which it paid to Boggs and for which it received nothing. This, we say, is the result of the decision of this court as appears in the prevailing opinion.

It is not our purpose, in this petition, to attempt to convince this court that it erred in so much of the decision as holds that the Government was not entitled to recover as damages from the sureties the amount of the excess cost of constructing the building under the Owen's contract over the contract price as mentioned in the Boggs' contract. We confidently believe that there is a clear-cut distinction in this regard between the present case and the case of *American Bonding Company v. United States*, 167 Federal, 910, and the case of *United States v. Freil*, 186 U. S., 309; but the prevailing opinion in the present case seems to be so emphatic as to the effect of the two decisions last cited that it would be useless and a waste of time of ourselves and this honorable court to pursue this phase of the subject further.

However, in relation to another and equally important phase of the case, namely, the right of the Government to recover as damages in the present action the amount of the payments made to the contractor, Boggs, during the progress of the work, less the value as found by the court below of the materials taken by the Government, it is our firm and sincere opinion that this court has not given this phase of the case its proper consideration, nor do we feel that the reasoning of the court in its prevailing opinion (if properly understood by us) is decisive against the Government's contention in this regard.

If we understand the prevailing opinion of the court in the instant case correctly, the kernel of the whole decision is contained in two sentences—first, the first sentence found in the opinion, reading as follows: "The question in this case is whether the surety on a contractor's bond, conditioned for his performance of a contract for the erection of a stone mess hall and kitchen at the Rice Station Indian School in the then Territory of Arizona, was released by occurrences happening subsequent to the entering by the contractor upon the performance of the contract"; and, second, by the statement found at the close of the opinion, reading as follows: "Boggs' surety is not, in our opinion, liable in this action, for the reason that the Government did not complete Boggs' contract, as it had the right to do, but, instead, chose to have the structures erected in a substantially different manner, pursuant to the contract made by it with Owen."

The opinion seems to rest this conclusion entirely upon the two cases hereinbefore cited, to wit, *American Bonding Company v. United States* and *United States v. Freel*.

Concerning the *Freel* case, it is our opinion that there is a vast distinction between it and the case at bar. The decision in the *Freel* case rests primarily upon the well-known doctrine of the law of suretyship that a surety has a right to stand on the strict terms of his contract and cannot be held to guarantee or insure anything other than the performance of the terms and conditions of the identical contract which the bond is given to secure. It appeared

464 conclusively in the *Freel* case that the Government and the contractor agreed, without the consent of the surety, to change, in material and substantial respects, the terms and conditions of the identical original contract between the contractor and the Government, the performance of which in its original and not in its changed condition the surety had guaranteed. The contractor, it appears, made some attempt at performance, but not of the contract guaranteed by the surety but of an entirely different contract; and this with the Government's consent. Manifestly it would be ridiculous to assert that the surety in that case could be held responsible for the failure of the contractor to perform a different contract from that which the surety guaranteed he would perform. In other words, the gist of the decision seems to be a total failure of proof on behalf of the Government, in this, that the proof showed that the surety guar-

anteed the performance of one contract and that the breaches and defaults charged against the contractor were not under that contract but under an entirely different one, to which the surety never consented and by which he was never bound. It was simply a case where the Government insisted upon recovering damages for the non-performance of a contract which the sureties did not guarantee.

In the case of *American Bonding Company v. United States*, supra, it conclusively appears that the Government was not seeking to recover general damages by reason of the breach and default of the contractor Axman under his contract, but, on the contrary, was seeking to avail

465 itself of a special privilege or mode of action granted to it by the contract under certain conditions. In its complaint the Government planted itself squarely upon a certain clause of the contract which gave it the right to eject the contractor from the work, to take charge of the same, and "to complete the work left undone" by the contractor, in which event, and in which event only, was it entitled to avail itself of the privileges and advantages specifically set forth in that particular clause of the contract. In that action the Government distinctly and clearly claimed the benefit of those specific privileges. It therefore, of course, became absolutely essential for it to prove that it had performed and complied with the conditions which under the clause of the contract were conditions precedent to its right to avail itself of such privileges. In other words, it must "complete the work left undone" by the contractor. This it failed absolutely to do, but, on the contrary, did an entirely different piece of work.

No such condition of affairs present itself in this case. This is a suit for general damages. At no place in the complaint is it stated, either directly or indirectly, that the Government, by this action is seeking to take advantage of some particular or specific privilege given it by article 4 or any other clause of the contract. Nor is it stated, directly or indirectly, in the complaint that the Owens contract was entered into by the Government under any right or privilege given it by article 4 or any other specific clause of the contract. It is true that the complaint sets up and counts upon the action of the Government in entering into a new contract for the construction of a building made necessary by the default of Boggs with the contractor Owen. It is true that the complaint counts upon the

466 excess of the contract price of the Owen contract over that of the contract with Boggs, and, among other things, asks to be allowed to recover this excess contract price as one of the elements of damage, on the theory that the contract price of the Owen contract was the reasonable value of the work done, and that the difference between such reasonable value paid by the Government and the price at which Boggs agreed to do the same work is the proper measure of damages to be allowed on this item of damage. But these matters are pleaded only to show one of the elements of damage for which

recovery is sought and not to show performance of conditions precedent to the exercise of any special right or privilege given by the contract.

Again, both the *Freel* case and the *American Bonding* case are clearly distinguishable from the case at bar, so far as respects the item of damage by reason of the payment of the two progress payments in the course of the work, and of the fact that the Government has not received anything in return therefor, except the materials taken at the time possession of the premises was taken and for which a counterclaim was allowed in the lower court. No claim for money expended by the Government as part payment for the work was involved in either of the two cases cited. This is an important and entirely independent element of damage in cases of this character. It was a loss already sustained before any of the "occurrences happening subsequent to the entering by the contractor upon the performance of his contract," referred to in the first sentence of the court's opinion. The Government had already, as appears from the
467 findings, in good faith and in reliance upon the contract, and of the defendant's ability and willingness to perform the same, made these expenditures long before the doing of any of the acts which the prevailing opinion states released the sureties.

If we interpret the opinion of the court correctly, the entire decision rests upon the construction which the court gives to article 4 of the contract. This article provides:

"It is further covenanted and agreed * * * that if the said party of the second part shall fail to complete the work * * * or shall fail to prosecute said work * * * the said party of the first part * * * is authorized and empowered * * * to take possession of the said work in whole or in part, and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and at the expense of said party of the second part, to complete or have completed the said work, and to supply or have supplied the labor, materials, and tools of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part and his sureties of the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this contract."

Do we understand the court as interpreting this article of the contract the same as if it read exactly as it does and also had added thereto a clause to the following effect: "Provided, however, that in
468 no event and under no circumstances shall the party of the first part be entitled to recover any damages whatever for any breach or default by the said party of the second part of the terms of this contract, unless the said party of the first part shall take possession of said premises and the materials, tools, and machinery

thereon and build the identical same structure strictly in accordance with the plans and specifications attached hereto and made a part hereof"?

We have intentionally, in the last sentence, used the expression "any damages whatever," because the effect of the prevailing opinion in the case will be to deprive the Government of the right to recover any damages whatever, including the expenditures made in the way of progress payments. If this is the construction which the court places upon article 4 (and we are constrained to believe that it is), we feel that the court has failed to grasp the proper meaning and effect to be given to said article 4, and, indeed, emasculates entirely certain of the words and phraseology found in said article.

We think it will not be denied that if article 4 was not at all contained in the contract that the sureties on the bond would nevertheless be liable for all damages sustained by the Government directly traceable to the default of the contractor. It is not a condition precedent to the liability of the sureties on a bond given for the faithful performance of an agreement that the agreement itself provides any measure or mode of ascertaining damages, or, indeed, refer in any way to the question of damages.

Where a party to a contract calling for work and labor or the furnishing of materials is injured by the default or breach of
469 such contract by the other contracting party and is prevented from performing his part of the contract and receiving what he was to have obtained thereunder, the first and most obvious item of damage which he has sustained and which he is entitled to recover is the amount or value of any expenditures which he may have made in the performance of his part of the contract, less the value of anything he received in return therefor. *U. S. v. Behan*, 110 U. S., 338, 28 L. Ed., 168; *Fidelity Trust Co. v. American Surety Co.*, 175 Fed., 200.

Another element of such party's damage, equally important and equally recognized by all the authorities, is his right to recover the profits he would have made had the contract been performed by the other party. *Summons v. Wittman*, Mo. App., 88 S. W., 791; *City of Goldsboro v. Moffett*, 49 Fed., 213.

These two items of damage are each distinct and independent of the other. The plaintiff may be entitled to recover his expenditures, although he may be powerless to prove the element of loss of profits. *United States v. Behan*, 110 U. S., 338.

It appears from the above, therefore, that if article 4 were not contained in the contract in suit there could be no doubt whatever of the right of the Government to recover the amount paid out in progress payments in an ordinary action for damages, such as the present case, and the sureties on the bond would be liable therefor. The question then resolves itself into this: Does the insertion of article 4 in
470 the contract have the effect of reversing these conditions absolutely and making it impossible for the Government to recover

any damages whatever, even the \$7,895.40 paid out and expended by it as progress payments? We think not.

Such a conclusion does violence to the language used. It is plainly a provision for the benefit of the Government and not for the benefit of the contractor and his sureties. *American Surety Co. v. San Antonio Loan & Trust Co. (Texas)*, 98 S. W. Rep., 387, 402.

The language used in the above case is "shall be at liberty" to provide materials, etc., but that is the plain meaning of "is authorized and empowered," the language of article 4. The Government certainly was not, under that language, compelled to "take possession" and complete or rather do the work or cause it to be done as a condition precedent to recovery of any damage whatever. If they did "take possession" the contractor would undoubtedly have to pay the "expense" of completion of the work, in addition to any other damage, but there is nothing in the article that even implies that the Government would waive any other damage that might be caused by the default of the contractor, even if it did not take possession and complete the work. The words used recognize the general liability of Boggs and his sureties for any damage incurred through any default or breach of the contract other than the particular default that was the ground for "taking possession," and provide specifically that Boggs and his sureties should, in the event that the Government took

possession of the work and materials and completed the work, 471 be "further" liable for the damages incurred in the excess cost of such completion. In other words, the Government, while it recognized the importance and perhaps the necessity for having the contract provide for special damages in the event that the Government took possession of and completed the work on default of the contractor, still was careful to provide in the contract that the statement of this right to special damage as expressed therein should not be construed as depriving the Government of its right to general damages by reason of any breach or default of said contract, which right existed independent of said article.

The case of *American Bonding Company v. Gibson Co.*, 127 Fed., 671, is cited and relied upon by this court as authority for the decision in *American Bonding Company v. United States*, 167 Fed., at page 918. The gist of the decision in *American Bonding Company v. Gibson Co.* is contained in the following excerpt from the opinion therein:

"If there be in the contract a provision for ascertaining the amount of damages incurred through a violation of any of its provisions, the surety has a right to insist on its observance before being held responsible."

Giving to article 4 of the Boggs contract the broadest possible construction, we fail to see how it can possibly be classified as "a provision for ascertaining the amount of damages" when said damages consist in the expenditure by the Government of the sum of \$7,895.40 as advance payments to the contractor, for which, by reason of his default and by reason of the destruction of the building by fire, it

received nothing. There is nothing in article 4 that either directly or indirectly fixes any mode for ascertaining the amount of this particular class of damages. Said article does not state directly or indirectly that the Government shall be limited to a recovery of the excess cost of building and completing the structure after Boggs' default over the price at which Boggs agreed to build the same, nor does it state directly or indirectly that the Government shall not be entitled to recover as damages any amount which it may have expended as advance or progress payments to the contractor, and for which, by reason of the destruction of the structure by fire or otherwise, it received nothing.

Indeed, while it may be true that the right of the Government to recover the excess cost of building the structure under the Owens contract was dependent upon its erection and completion of the identical same structure covered by the Boggs contract, yet its right to recover the amount of the progress payments as damages is not at all subject to the same rule. This point is made clear by the decision in the case of *American Surety Company v. Woods*, 105 Fed., 741, at page 746, which case is also cited with approval by this court in the case of *American Bonding Company v. United States* (supra), and, indeed, is one of the strongest opinions following the rule above quoted from the case of *American Bonding Company v. Gibson Co.* (supra).

We believe that the prevailing opinion errs also in its assumption that the Government "took possession of the work" under and for the purposes of article 4.

The evidence shows that as early as July the contractor was notified of many changes in the building that would have to be made before the same would conform to the specifications and be accepted by the Government. No steps were taken by the contractor

473 to make the building conform to the specifications, nor did the Government exercise its privilege of taking possession of the work under article 4 of the contract. The date fixed by the contract for completion of the building (September 1, 1905) came, but it was not completed nor had Boggs taken any steps to make it conform to the contract. On October 27, 1905, the building theretofore offered for acceptance in its faulty condition, was rejected by the Government because it did not comply with the contract.

No attempt was made by the contractor to reconstruct the building or to make it conform to the specifications, notwithstanding that he had knowledge of the fact that it would not and could not be accepted as a compliance with the contract, as early as July. The building burned November 4th, 1905, without any steps having been taken by the contractor to make it comply with the contract, although Boggs was given every opportunity so to do. December 28, 1905, two months after the building had been offered for acceptance and refused, and five months after Boggs knew that the building would not and could not be accepted because it did not conform to the con-

tract, and after he had every opportunity to take steps to make the building conform to the contract or to commence reconstruction after the destruction of same by fire, and after he had wholly neglected so to do, Boggs was ordered to leave the reservation and did so.

We submit that the action of Boggs amounted to an abandonment of the contract on his part, and that his keeping possession of the premises for the length of time he did without going ahead with his contract, made him a trespasser, and that the Government was
474 compelled to take the course it did to get possession of its premises, to which Boggs had forfeited all right by reason of his abandonment of his work, and that the action of the Government in ejecting Boggs was in no sense a "taking possession of the work" under article 4 of the contract.

Does the court mean to say that the Government was compelled to let Boggs hold possession of its premises indefinitely or suffer the alternative that any action dispossessing him would be a "taking possession of the work," and also that after it had recovered rightful possession of its premises, notwithstanding a change in conditions at the reservation might require a different mess hall from the one it had decided on two years prior thereto, that it could not build such needed building except at the risk of releasing the sureties on Boggs' bond and forfeiting the progress payments made and for which it received nothing?

It is true that the trial court found that the Government confiscated materials to the value of \$2,418.58 belonging to Boggs, but that fact, in view of the evidence, could not be construed as a "taking possession" under and pursuant to article 4 of the contract, as it appears to have been an attempt to recoup the loss the Government was put to by Boggs' default and abandonment of his contract.

THE EFFECT OF THE FIRE.

From a reading of the majority opinion we fail to gather that the court has considered the destruction of the building constructed by

Boggs by fire on November 4, 1905, as of any importance or
475 materially in the decision of the case. The authorities all agree that where a building in process of construction is still in the possession of the contractor and has not yet been accepted by the owner, the loss, in case of destruction by fire or otherwise, falls entirely on the contractor.

In such event the owner is entitled to recover as damages for breach of the contract whatever general damages he may prove and, in particular, whatever sums he may have paid out under the contract as the work progressed. *Dermott v. Jones*, 69 U. S., 1, 7, 8; *Bartlett v. Bisbee* (Texas), 66 S. W. Rep., 70, 72; *American Surety Co. v. San Antonio, etc., Co.* (Tex.), 98 Q. W., 387.

It seems to us that the right of the Government under such circumstances in the present case to recover at least the amount of the

The United States vs.

progress payments is not dependent at all upon, and has no connection whatever with, article 4 of the contract. American Surety Co. v. San Antonio, etc., Co. (supra).

For the reasons and upon the grounds herein set forth, we respectfully petition this honorable court that a rehearing be granted in this cause and that the important questions therein involved be reconsidered.

A. I. McCORMICK,
United States Attorney.

DUDLEY W. ROBINSON,
Assistant United States Attorney.

HARRY R. ARCHBALD,
*Assistant United States Attorney,
Of Counsel for Defendant in Error.*

476 The undersigned, United States attorney for the Southern District of California, and one of the counsel for the defendant in error in this cause, hereby certifies that the foregoing petition for rehearing is, in his judgment, well founded in law and that it is not interposed for delay.

A. I. McCORMICK,
United States Attorney and Counsel for Defendant in Error.

477 United States Circuit Court of Appeals for the Ninth Circuit.

At a stated term, to wit, the October term, A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and county of San Francisco, in the State of California, on Monday, the seventh day of October, in the year of our Lord one thousand nine hundred and twelve.

Present: Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY
of Baltimore, Maryland, a corporation, plaintiff in
error,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR,
and

THE UNITED STATES OF AMERICA, CROSS PLAINTIFF IN
error,

vs.

AUGUSTUS W. BOGGS ET AL., CROSS DEFENDANTS IN ERROR.

No. 1982.

Order denying petition for rehearing.

Good cause therefor appearing, it is ordered that the petition filed May 27, 1912, for a rehearing of the above-entitled cause be, and hereby is, denied.

478 United States Circuit Court of Appeals for the Ninth Circuit.

At a stated term, to wit, the October term, A. D. 1912, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the court room thereof, in the city and county of San Francisco, in the State of California, on Tuesday, the eleventh day of February, in the year of our Lord one thousand nine hundred and thirteen.

Present: Honorable William B. Gilbert, circuit judge; Honorable William W. Morrow, circuit judge; Honorable Charles E. Wolverton, district judge.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY
of Baltimore, Maryland, a corporation, plaintiff in
error,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR,
and

THE UNITED STATES OF AMERICA, CROSS PLAINTIFF IN
error,

vs.

AUGUSTUS W. BOGGS ET AL., CROSS DEFENDANTS IN ERROR.

No. 1982.

Order granting United States leave to file petition for allowance of writ of error and assignment of errors and directing entry of order granting said petition and allowing writ of error, etc.

Upon motion of Mr. United States Attorney A. I. McCormick, counsel for the defendant in error and cross plaintiff in error, it is ordered that leave be, and hereby is, granted to the United States to file a petition for the allowance of a writ of error from the Supreme

Court of the United States, and an assignment of errors on
479 such writ of error in the above-entitled cause.

Thereupon the matter of the allowance of such writ of error by this court and the signing, sealing, and issuance thereof by the clerk of this court and the matter of the preparation by said clerk of a duly authenticated transcript of the record, proceedings, and papers on return to such writ of error, having been duly presented by Mr. McCormick to the court for consideration and decision, and having been duly submitted and considered, an order in the words and figures following was duly signed by the Honorable William B. Gilbert, senior United States circuit judge, presiding, and ordered entered as follows, to wit:

"The foregoing petition is granted and the writ of error allowed as prayed for. The clerk of the United States Circuit Court of Appeals for the Ninth Circuit is hereby directed to issue said writ of error and to prepare a proper and duly authenticated transcript of the

The United States vs.

record, proceedings, and papers in said cause to be sent to said Supreme Court of the United States.

"Dated February 11, 1913.

"(Signed.)

WM. B. GILBERT,

"Circuit Judge and Presiding Judge

"of said Circuit Court of Appeals."

480 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES FIDELITY & GUARANTY COMPANY OF
Baltimore, Maryland, a corporation, plaintiff in error,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR,
and

THE UNITED STATES OF AMERICA, CROSS PLAINTIFF IN ERROR,

vs.

THE UNITED STATES FIDELITY & GUARANTY COMPANY OF
Baltimore, Maryland, a corporation, and Augustus W.
Boggs, cross defendants in error.

No. 1982.

Petition for writ of error from the Supreme Court of the United States.

Your petitioner, the United States of America, defendant in error and cross plaintiff in error in the above-entitled cause in this court, respectfully shows:

I.

That on the 12th day of March, 1908, the above cause was commenced by your petitioner, the United States of America, as plaintiff, against Augustus W. Boggs and the United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, as defendants, by the filing of a complaint in the then Circuit Court of the United States for the Southern District of California. That thereafter summons in said cause was duly and regularly issued by said court
481 and the clerk thereof, and was duly and regularly served on each of said defendants. That said Augustus W. Boggs, one of the defendants in said cause, failed, neglected, and refused to appear or plead in said cause within the time required by law, and thereafter and on the 25th day of September, 1908, the default of said Augustus W. Boggs for having so failed to appear or plead was duly and regularly taken and entered in said cause. That within the time allowed by law the said the United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, the other defendant in said cause, served and filed in said circuit court its answer to said complaint. That thereafter and on the 13th day of April, 1910, the

said action came on regularly for trial in the said Circuit Court of the United States before said court, without a jury, a jury trial having been waived by a written stipulation of the parties filed in said cause, and evidence having been introduced by and on behalf of your petitioner, the United States of America, as plaintiff, and the said the United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, as defendant, and the evidence having been closed and the case argued and submitted to the court for its decision and judgment, the said court, on the 18th day of July, 1910, duly gave, made, and rendered its written findings of fact and conclusions of law in said cause and ordered that judgment be entered in favor of your petitioner, the United States of America, as plaintiff in said cause, in accordance with said findings and conclusions, and in and by said
482 judgment it was ordered, adjudged, and decreed that the United States of America, your petitioner, have and recover of and from the said defendants, Augustus W. Boggs and the United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, the sum of \$7,403.09; provided, however, the liability of the said defendant, the United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, should not exceed nor be enforceable for more than the sum of \$6,500.00, exclusive of the costs of suit; and that said plaintiff, your petitioner, the United States of America, further have and recover from said defendants its costs in said suit, taxed at \$736.93; that said judgment was given, made, and entered in said court on the said 18th day of July, 1910. That thereafter the said defendant therein, to wit, the said the United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, on January 16, 1911, made and filed its petition for writ of error from the Circuit Court of Appeals for the Ninth Circuit to said Circuit Court for the Southern District of California to review said judgment, and thereafter and after proceedings had and taken a writ of error was allowed and issued as prayed for in said petition. That on the 17th day of January, 1911, your petitioner, the United States of America, as plaintiff in said cause, made and filed its petition for a cross writ of error from said Circuit Court of Appeals for the Ninth Circuit to said Circuit Court for the Southern District of California for the purpose of having reviewed in said circuit court of appeals the said judgment of said circuit court hereinbefore referred to, in so far as
483 the same refused the relief prayed for in said complaint in said cause to the extent requested in said complaint. That thereafter and after all necessary proceedings having been duly had and taken, the said cross writ of error as prayed for in said petition of your petitioner was on the said 17th day of January, 1911, duly and regularly allowed and issued.

II.

Thereafter the said cause came on duly and regularly for hearing before said Circuit Court of Appeals for the Ninth Circuit upon said writ of error and said cross writ of error, and the said cause was, by stipulation of the parties and with the consent of said Circuit Court of Appeals, heard on both of said writs of error on the same record.

III.

That the above-entitled cause is now pending in the said United States Circuit Court of Appeals for the Ninth Circuit and that said court, on the 22d day of March, 1912, gave, made and rendered, and entered its judgment therein reversing said judgment of the said Circuit Court of the United States for the Southern District of California, and directing and ordering that the cause be remanded with directions to the court below to enter judgment for the said defendant, the United States Fidelity & Guaranty Company of Baltimore, Maryland, plaintiff in error and cross defendant in error therein and against your petitioner, the United States of America, defendant in error and cross plaintiff in error therein, on the findings.

484 All of the foregoing is to be fully and clearly set forth and made to appear in the certified transcript of the record to be prepared by the clerk of said Circuit Court of Appeals and filed herewith, reference to which is hereby made.

IV.

Your petitioner further shows that the matter in controversy in this cause exceeds \$1,000, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in anywise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different States, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error.

Your petitioner, feeling itself aggrieved by the said decision and judgment of said Circuit Court of Appeals rendered and entered on March 22, 1912, therefore respectfully prays that a writ of error from the Supreme Court of the United States be allowed it in the above-entitled cause, and that the clerk of the United States Circuit Court of Appeals for the Ninth Circuit be directed to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that said decision and judgment of said Circuit Court of Appeals and the errors complained

485 of in the assignment of errors herewith filed by your petitioner may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

THE UNITED STATES OF AMERICA,
Defendant in Error and Cross Plaintiff in Error,
 By (Signed) GEORGE W. WICKERSHAM,
Attorney General of the United States.
 (Signed) A. I. MCCORMICK,
United States Attorney.

The foregoing petition is granted and the writ of error allowed as prayed for. The clerk of the United States Circuit Court of Appeals for the Ninth Circuit is hereby directed to issue said writ of error and to prepare a proper and duly authenticated transcript of the record, proceedings, and papers in said cause to be sent to said Supreme Court of the United States.

Dated February 11, 1913.

(Signed) WM. B. GILBERT,
*Circuit Judge and Presiding Judge
 of said Circuit Court of Appeals.*

(Endorsed:) Petition for writ of error from Supreme Court U. S., and order granting petition, allowing writ as prayed, and directing clerk to issue writ, etc. Filed Feb. 11, 1913. F. D. Monckton, clerk.

486 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES FIDELITY & GUARANTY COMPANY OF Baltimore, Maryland, a corporation, plaintiff in error, <i>vs.</i> THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR, and THE UNITED STATES OF AMERICA, CROSS PLAINTIFF IN error, <i>vs.</i> THE UNITED STATES FIDELITY & GUARANTY COMPANY OF Baltimore, Maryland, a corporation, and Augustus W. Boggs, cross defendants in error.	} No. 1982.
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Assignment of errors.

Comes now the United States of America, defendant in error and cross plaintiff in error in the above-entitled cause, by George W. Wickersham, its Attorney General, and A. I. McCormick, United States attorney for the Southern District of California, and, in connection with its petition for writ of error herein from the Supreme Court of the United States to the Circuit Court of Appeals for the Ninth Circuit, says that the decision and judgment rendered and

entered by the said Circuit Court of Appeals for the Ninth Circuit on the 22d day of March, 1912, in the above-entitled cause, is erroneous, and that in the record and proceedings in said cause in said
487 Circuit Court of Appeals there is manifest error in the following particulars:

First. Said Circuit Court of Appeals erred in rendering and entering judgment that the judgment of the Circuit Court of the United States for the Southern District of California made and entered by said Circuit Court in said cause on the 18th day of July, 1910, in favor of The United States of America and against the said The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, and Augustus W. Boggs, be reversed.

Second. Said Circuit Court of Appeals erred in rendering and entering judgment that the judgment of the Circuit Court of the United States for the Southern District of California made and entered by said Circuit Court in said cause on July 18, 1910 (which said judgment provided that the plaintiff therein, The United States of America, do have and recover of said defendants therein, said The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, and said Augustus W. Boggs, the sum of \$7,403.09 and costs; provided the liability of said The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, defendant therein, should not exceed \$6,500.00, exclusive of costs), be reversed.

Third. Said Circuit Court of Appeals erred in rendering and entering judgment that the judgment of the Circuit Court of the United States for the Southern District of California made and entered by said Circuit Court in said cause on July 18, 1910, in favor of this defendant in error and cross plaintiff in error, The
488 United States of America, and against said plaintiff in error and cross defendant in error, The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, for the sum of \$6,500.00 and costs, be reversed.

Fourth. Said Circuit Court of Appeals erred in rendering and entering judgment that the judgment of the Circuit Court of the United States for the Southern District of California made and entered by said Circuit Court in said cause on July 18, 1910, in favor of this defendant in error and cross plaintiff in error, The United States of America, and against said Augustus W. Boggs, cross defendant in error, for the sum of \$7,403.09 and costs, be reversed.

Fifth. Said Circuit Court of Appeals erred in rendering and entering its judgment and order directing the lower court to enter judgment for the said plaintiff in error and cross defendant in error, The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, and against this defendant in error and cross plaintiff in error, The United States of America, on the findings.

Sixth. Said Circuit Court of Appeals erred in deciding and adjudging that the findings of fact of and by the said Circuit Court were not

sufficient to sustain the said judgment rendered by said Circuit Court in favor of The United States of America and against said The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, and said Augustus W. Boggs.

489 Seventh. Said Circuit Court of Appeals erred in deciding and adjudging that under and by virtue of said findings of fact as found by said Circuit Court, the said plaintiff in error and cross defendant in error, The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, was entitled to a, or any, judgment against this defendant in error and cross plaintiff in error, The United States of America.

Eighth. Said Circuit Court of Appeals erred in deciding and adjudging that said plaintiff in error and cross defendant in error, The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, is not liable in this action for the alleged reason that this defendant in error, The United States of America, did not complete the contract with said cross defendant in error, Augustus W. Boggs, but erected the structures in a substantially different manner, and in deciding and adjudging that by reason of the above said judgment of the Circuit Court in favor of The United States of America should be reversed.

Ninth. Said Circuit Court of Appeals erred in deciding and adjudging that the Government did not complete said contract with said Augustus W. Boggs, and in deciding and adjudging that the contract with James H. Owen and the work done thereunder were substantially different from the work called for by the said contract with said Augustus W. Boggs, and in deciding and adjudging that for those reasons the said The United States Fidelity & Guaranty Company of

Baltimore, Maryland, a corporation, was not liable in this
490 action, and that therefore the judgment of said Circuit Court in favor of The United States of America should be reversed.

Tenth. Said Circuit Court of Appeals erred in deciding and adjudging that the action of the Government in entering into said contract with James W. Owen and in causing or allowing the work to be done thereunder exonerated said The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, from all liability in this action and barred and prevented this defendant in error and cross plaintiff in error from recovering any damages whatever in this action from said plaintiff in error and cross defendant in error.

Eleventh. Said Circuit Court of Appeals erred in deciding and adjudging that said surety, The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, plaintiff in error and cross defendant in error, was not liable to The United States of America, defendant in error and cross plaintiff in error, for the amount of the installment and progress payments made by The United States of America to said Augustus W. Boggs under the contract with said Boggs, together with interest thereon, less the reasonable value of the labor and material taken by the Government at the time said

Boggs was ejected from the premises after default, together with interest on the same, as found by the lower court.

491 Twelfth. Said Circuit Court of Appeals erred in failing and refusing to decide and adjudge that this defendant in error and cross plaintiff in error, The United States of America, in addition to the relief granted by said decision and judgment of said Circuit Court, was and is also entitled to recover interest at seven per cent per annum on the sum of \$6,500.00 from the first day of September, 1905, to date of payment, because said sum of \$6,500.00 is the penal sum (yet unpaid) specified in the surety bond given by said plaintiff in error and cross defendant in error, The United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, on condition of no breach of a certain contract dated February 23, 1905, between the United States of America and said Augustus W. Boggs, when, as a fact duly found by said court, said contract was breached by the said Augustus W. Boggs on and before said first day of September, 1905.

Thirteenth. Said Circuit Court of Appeals erred in failing and refusing to conclude as a matter of law from the findings as found by said Circuit Court and pronounce and decree as the judgment of said Circuit Court of Appeals that this defendant in error and cross plaintiff in error, the United States of America, was of right entitled to the relief granted it by said judgment of the Circuit Court and in addition to said relief granted by said decision and judgment of said Circuit Court as rendered, was and is also entitled to recover interest

on the sum of \$6,500.00 from the first day of September, 1905,
492 to the date of payment of same at the rate of seven per cent per annum, because in said findings of fact as found by said Circuit Court it affirmatively appears that said sum of \$6,500.00 is the penal sum specified in the said bond given by the said plaintiff in error and cross defendant in error herein, the United States Fidelity and Guaranty Company of Baltimore, Maryland, a corporation, to the United States of America on condition of no breach of that certain contract mentioned in said findings, dated February 23, 1905, between this defendant in error and cross plaintiff in error, the United States of America, and the cross defendant in error herein, Augustus W. Boggs, when as a fact duly found by said Circuit Court said contract was breached and complete default made therein by said Augustus W. Boggs on and before said first day of September, 1905.

Fourteenth. Said Circuit Court of Appeals erred in failing and refusing to decide and adjudge that this defendant in error and cross plaintiff in error, The United States of America, in addition to the relief granted it by said decision and judgment of said Circuit Court, was and is also entitled to recover and to have judgment for the difference between the contract price under the said building contract between the United States of America and the cross defendant in error, Augustus W. Boggs, and the contract price under the building contract dated January 22, 1907, between the United States of Amer-

ica and one James H. Owen, because said contracts and the other evidence in this case furnish definitely ascertained factors as a basis for accurate mathematical calculation in liquidating the loss
493 and damage suffered by this defendant in error and cross plaintiff in error on account of said Boggs' breach of his said contract with it on and before the first day of September, 1905, as aforesaid.

Fifteenth. Said Circuit Court of Appeals erred in failing and refusing to decide and adjudge from the facts as found in the said findings of said Circuit Court, and especially from the facts as found in said Finding No. XXIV of the findings of said Circuit Court, that this defendant in error and cross plaintiff in error, the United States of America, in addition to the relief granted by said decision and judgment of said Circuit Court, was and is entitled to recover from said cross defendants in error herein, the United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, and Augustus W. Boggs, the sum of \$2,191.00, being the difference between the contract price under the said building contract between the United States of America and said Augustus W. Boggs and the contract price under the building contract dated January 22, 1907, between the United States of America and the said James H. Owen, after deducing from said contract price of said contract between this defendant in error and cross plaintiff in error and said James H. Owen, the sum of \$1,700.00, being the amount and value and cost of the work done and materials furnished under said contract with said James H. Owen, which was different from or in addition to the work, labor, and materials called for in the said contract with the said Augustus W. Boggs, because it affirmatively appears from the facts
494 as found by said Circuit Court that by reason of the default of said cross defendant in error, Boggs, this defendant in error and cross plaintiff in error was compelled to and did necessarily expend in procuring that to be done which the said Boggs in his said contract had agreed to do, the sum of \$14,900.00, the same being \$2,191.00 in excess of the price at which Boggs agreed to do the same; and it affirmatively appears from said facts as found by said Circuit Court, and especially from said Finding No. XXIV, that any and all differences, changes, or additions between the work and materials called for under the said contract with the said Augustus W. Boggs, and the work, labor, and materials called for and furnished under the said contract with the said James H. Owen, together with the value and cost thereof, were clearly and definitely ascertained, and it then became and was a mere matter of mathematical calculation to ascertain the necessary cost to this defendant in error and cross plaintiff in error, The United States of America, of procuring the precise work, labor, and materials called for by said contract with said Augustus W. Boggs.

Sixteenth. Said Circuit Court of Appeals erred in rendering and entering judgment and decision that this defendant in error and cross

plaintiff in error was and is not entitled to any judgment against said plaintiff in error and cross defendant in error, The United States Fidelity & Guaranty Company of Baltimore, Maryland, for any damages arising out of the wilful breach and default of said

Augustus W. Boggs of his said contract with the United
495 States of America, for the reason, as alleged by said Circuit

Court of Appeals, that this defendant in error and cross plaintiff in error, after the breach and default of said Boggs, entered into said contract with said James H. Owen and caused or allowed the structures called for by said contract to be constructed and completed by said James H. Owen. Herein said Circuit Court of Appeals erred, because the liability of said Augustus W. Boggs as contractor and principal and the said The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, as surety on the bond which forms the basis of this action, became fixed upon said breach and default of said Boggs and was not in any way dependent upon and could not be affected by the subsequent transactions between this defendant in error and cross plaintiff in error and said James H. Owen.

Seventeenth. Said circuit court of appeals erred in failing and refusing to decide and adjudge and to pronounce as its judgment that this defendant in error and cross plaintiff in error was, and is, entitled to judgment in said cause against said cross defendant in error, Augustus W. Boggs, for the sum of \$7,667.82 and interest thereon at seven per cent per annum from March 20, 1908, to July 18, 1910, in all \$9,062.38, and in failing and refusing to decide and adjudge and to pronounce as its judgment that this defendant in error and cross plaintiff in error was, and is, entitled to judgment in said cause against said plaintiff in error and cross defendant in error, the

United States Fidelity & Guaranty Company of Baltimore,
496 Maryland, for the sum of \$6,500.00 (the penal sum mentioned in said surety bond) and interest thereon at seven per cent per annum from March 20, 1908, to July 18, 1910, in all \$7,559.35, and in failing and refusing to remand said cause to the trial court with instructions to enter said judgments in the form and amount hereinabove in this assignment set forth. And herein said circuit court of appeals erred, because the evidence and record before said court of appeals showed conclusively that the summons and complaint in said action was served on said the United States Fidelity & Guaranty Company of Baltimore, Maryland, and Augustus W. Boggs on March 20, 1908, and that each of them was on that date notified and informed of the breach and default of said Augustus W. Boggs in the performance of his said contract with the United States of America, and of the amount of damages sustained by this defendant in error and cross plaintiff in error, the United States of America, by reason of said breach and default and demand for the payment of the same was in and by said summons and complaint and the service thereof, made on said March 20, 1908. Said evidence and record also

showed that on said March 20, 1908, this defendant in error and cross plaintiff in error had been, by reason of said breach and default of said Augustus W. Boggs, damages in the sum of \$5,467.82 (which said amount represents the amount of the advance or progress payments made by the United States of America to said contractor, Augustus W. Boggs, to wit, \$7,895.40, less \$2,418.58, the value of the materials appropriated by the United States of America) and 497 in the further sum of \$2,191 (which said amount represents the excess cost of completion by the new contractor, James H. Owen, after deducting \$1,700, the value and cost of the work done and materials furnished under said Owen contract, different from or in addition to the work and materials called for in said Boggs contract), said damages aggregating in all the sum of \$7,667.82.

Eighteenth. Said circuit court of appeals erred in not overruling each and all of the assignments of error presented to said court by said plaintiff in error, the United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, and in not sustaining each and all of the assignments of error presented to said court by this cross plaintiff in error, the United States of America.

Wherefore this defendant in error and cross plaintiff in error, The United States of America, prays that, for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in this cause to the prejudice of this defendant in error and cross plaintiff in error, the said decision and judgment of said United States Circuit Court of Appeals be reversed and set aside and that said cause be remanded to the United States District Court for the Southern District of California, with instructions to said last-named court to give, make, and enter its judgment to the effect that this defendant in error and cross plaintiff in error, The United States of America, do have and recover of and from the said plaintiff in error and cross defendant in error, The United States

Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, the sum of \$7,559.35, together with costs of this 498 action, and its judgment that this defendant in error and cross plaintiff in error, The United States of America, do have and recover of and from the said cross defendant in error, Augustus W. Boggs, the sum of \$9,062.38, together with costs of this action, or for such further proceedings in said cause as may be determined upon by this honorable court, to the end that justice may be done in the premises.

Dated February 11, 1913.

By (signed)

THE UNITED STATES OF AMERICA,
GEORGE W. WICKERSHAM,

Attorney General.

(Signed)

A. I. McCORMICK,

United States Attorney for the Southern District of California.

(Endorsed:) Assignment of errors. Filed Feb. 11, 1913. F. D. Monckton, clerk.

492 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY
of Baltimore, Maryland, a corporation, plaintiff in
error,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR,
and

THE UNITED STATES OF AMERICA, CROSS PLAINTIFF IN ERROR,
vs.

AUGUSTUS W. BOGGS ET AL., CROSS DEFENDANTS IN ERROR.

No. 1982.

*Praeceptum for certified transcript of record upon writ of error from
Supreme Court U. S.*

To the clerk of the said court:

SIR: Please issue a certified transcript of the record on writ of error from Supreme Court of the United States in the above-entitled cause, consisting of the following:

1. Certified copy of printed transcript of record on writ of error and certified copy of transcript of record on cross writ of error to which will be added a certified copy of proceedings had in the Circuit Court of Appeals, viz:

2. Order of submission.

3. Opinion and dissenting opinion.

4. Judgment. 4a. Petition for rehearing and order thereon.

5. Petition for allowance of writ of error from Supreme Court U. S.

6. Order allowing writ of error from Supreme Court U. S.

7. Assignment of errors.

8. Praeceptum for certified transcript of record on writ of error from Supreme Court U. S.

9. Certificate of clerk U. S. C. C. A. to transcript of record on writ of error from Supreme Court U. S.; and

10. Original writ of error and citation on writ of error from Supreme Court U. S.

(Signed)

A. I. McCORMICK,
United States Attorney.

Receipt of copy of the within praeceptum for certified transcript of record upon writ of error from Supreme Court U. S. is hereby admitted this 13th day of February, 1913.

(Signed)

FLINT, GRAY & BARKER,

(Signed)

WILLIAM A. BOWEN.

Attorneys for The United States Fidelity & Guaranty Company of Baltimore, Maryland, a Corporation, Deft. in Error.

(Signed)

A. M. Boggs,

Defendant in Error.

500 (Endorsed:) Praeipe for certified transcript of record upon writ of error from Supreme Court U. S. Filed Feb. 18, 1913. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

501 United States Circuit Court of Appeals for the Ninth Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY OF
Baltimore, Maryland, a corporation, plaintiff in error,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR,
and

THE UNITED STATES OF AMERICA CROSS PLAINTIFF IN ERROR,

vs.

AUGUSTUS W. BOGGS AND THE UNITED STATES FIDELITY AND
Guaranty Company of Baltimore, Maryland, a corpora-
tion, cross defendants in error.

No. 1982.

CERTIFICATE OF CLERK U. S. CIRCUIT COURT OF APPEALS TO TRANSCRIPT OF
RECORD UPON RETURN TO WRIT OF ERROR FROM THE SUPREME COURT
OF THE UNITED STATES.

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing five hundred (500) pages, numbered from and including one (1) to and including five hundred (500) to be a true copy of the complete record in the above-entitled cause, prepared pursuant to praecipe therefor filed by counsel for the United States of America, including all proceedings had therein, and including the opinion and dissenting opinion and the assignment of errors filed therein, as the same remain on file and appear of record in my office, and that the same together, constitute the transcript of record in said cause on return to the annexed writ of error from the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this eighteenth day of February, A. D. 1913.

[SEAL.]

F. D. MONCKTON, *Clerk.*

502

Writ of error.

UNITED STATES OF AMERICA, *ss.*:

The President of the United States to the honorable the judges of the United States Circuit Court of Appeals for the Ninth Circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals

before you, or some of you, between The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, as plaintiff in error and cross defendant in error, and The United States of America, as defendant in error and cross plaintiff in error, and Augustus W. Boggs, as cross defendant in error, a manifest error hath happened, to the great damage of The United States of America, defendant in error and cross plaintiff in error therein, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and
503 according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 11th day of February, in the year of our Lord one thousand nine hundred and thirteen.

F. D. MONCKTON,
*Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.*

Allowed by—

WM. B. GILBERT,
Presiding Judge of said Circuit Court of Appeals.

504

RETURN TO WRIT OF ERROR.

The answer of the judges of the United States Circuit Court of Appeals for the Ninth Circuit to the within writ of error:

As within we are commanded, we certify under the seal of our said circuit court of appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 18th day of February, A. D. 1913, duly lodged in the cause in this court for the within-named defendants in error.

By the court:

[SEAL.]

F. D. MONCKTON,
*Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.*

Receipt of copy of the within writ of error is hereby admitted this 13th day of February, 1913.

FLINT, GRAY & BARKER,

WILLIAM A. BOWEN,

*Attorneys for The United States Fidelity & Guaranty Company
of Baltimore, Maryland, a corporation, Deft. in Error.*

A. W. BOGGS,

Deft. in Error.

(Indorsed:) Orig. Marshal's civil docket No. 2045. In the Circuit Court of Appeals of the United States for the Ninth Circuit. The United States of America, deft. in error and cross plff. in error, vs. The U. S. Fidelity & Guaranty Co. of Baltimore, Md., a corporation, & Augustus W. Boggs, plffs. in error and cross defts. in error. Writ of error. Filed Feb. 18, 1913. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

505

Citation.

UNITED STATES OF AMERICA, 88:

The President of the United States to The United States Fidelity & Guaranty Company of Baltimore, Maryland, a corporation, and Augustus W. Boggs, greeting:

You and each of you are hereby cited and admonished to be and appear before the Supreme Court of the United States to be holden at the city of Washington, District of Columbia, within sixty (60) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein The United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, circuit judge and presiding judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 11th day of February, in the year of our Lord one thousand nine hundred and thirteen.

WM. B. GILBERT,

Circuit Judge and Presiding Judge of the United States

Circuit Court of Appeals for the Ninth Circuit.

Receipt of copy of the within citation is hereby admitted this 13th day of February, 1913.

FLINT, GRAY & BARKER,

WILLIAM A. BOWEN,

*Attorneys for The United States Fidelity & Guaranty Company
of Baltimore, Maryland, a corporation, Deft. in Error.*

A. W. BOGGS,

Deft. in Error.

470 *The United States*

506 (Indorsed:) *Mar*
United States Circuit
The United States Fidelity
The United States of America
Court U. S. Filed Feb. 18
circuit Court of Appeals for the

(Indorsement on cover:
Appeals, 9th Circuit. Term
in error, vs. The United States
Baltimore, Maryland, and
1913. File No., 23583.

s vs. The U. S. Fidelity etc. Co.

al's civil docket No. 2045. No. 19
Court of Appeals for the Ninth Circuit
& Guaranty Co. of Baltimore, Md.,
a. Citation on writ of error to Supreme
1913. F. D. Monckton, clerk U. S. C
e Ninth Circuit.

File No., 23583. U. S. Circuit Court
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ugustus W. Boggs. Filed March 11th



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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.

THE UNITED STATES FIDELITY & GUAR-
ANTY COMPANY OF BALTIMORE, MARY-
LAND, AND AUGUSTUS W. BOGGS. } No. 125.

*IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.*

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The original action was brought by the United States in the Circuit Court for the Southern District of California against Boggs and his surety (R. 5) to recover damages for failure on the part of Boggs to construct a stone mess hall and kitchen at the Rice Station Indian School in Arizona. The complaint (R. 5-19) sets out at length the contract, entered into February 23, 1905, whereby Boggs, in

consideration of the sum of \$12,709 to be paid to him at certain times, agreed to furnish all the labor and materials and do all the work necessary to complete said mess hall by September 1, 1905. Article 4 of the contract (R. 10, 66) provided that if Boggs should fail to complete the work or any part thereof as provided in the contract, or should fail to prosecute the work with such diligence as should, in the judgment of the United States, insure its completion within the time specified, the United States might withhold all payments for work in place until final completion and acceptance of the same, and on eight days' notice and continued default by Boggs might take possession of the work and of all tools and materials, and, at the expense of Boggs, complete or have completed the work; "*in which event the said party of the second part*" (namely, Boggs) "*and his sureties of the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this contract.*"

The complaint then alleged (R. 14, 15) that Boggs failed to complete the work on September 1, 1905, that notice was given him to that effect, and that he continued in default.

It further alleged that certain payments were made Boggs during the progress of the work, amounting to \$7,895.40, and that thereafter a relet contract was entered into with another party at a

sum in excess of Boggs' contract price (R. 16), and it claimed, in so far as material here, (a) damages for the breach in the amount of the progress payments and (b) of the excess cost of the relet contract. Boggs defaulted (R. 33), and the answer of the surety company (R. 27-31) was practically a general denial.

A jury was waived and the case tried to the court (R. 34). The court found (R. 40-56) that Boggs did not complete the mess hall in accordance with the specifications (R. 43, Finding V), that he did not complete said hall by September 1, 1905, or at all, nor turn the same over to the United States according to the contract (R. 47, Finding XI, R. 48, Finding XII); that the United States rejected the building (R. 48, Finding XV), notified Boggs thereof (R. 49, Finding XIX), and that Boggs did not remedy his default within the time provided (R. 48, Finding XIII). The court, however, found that the relet contract differed from the original contract so materially as not to afford a fair basis for damages (R. 52, 53, 54, Finding XXIV), and restricted the damages of the United States to the amount of money actually paid by the United States to Boggs during the progress of the work, and rendered judgment for this amount with interest—less certain credits—namely \$7,403.09, but confined the judgment against the surety company to the face of its bond, namely, \$6,500, without interest (R. 56-59).

The Court of Appeals (Judge Gilbert dissenting) followed its previous decision in the case of *American Bonding Co. v. United States*, 167 Fed. 910—on error *United States v. Axman*, 234 U. S. 36—, and held that “Boggs’ surety is not, in our opinion, liable in this action, for the reason that the Government did not complete Boggs’ contract, as it had a right to do, but instead chose to have the structures erected in a substantially different manner, pursuant to the contract made by it with Owen.”

“It results that the judgment must be reversed and the cause remanded with directions to the court below to enter judgment for the defendant surety company on the findings.” (R. 440; 194 Fed. 611, 617.)

In other words, the court held that the Government could not recover any damages at all—not even nominal—against the Surety Company, because the relet contract differed in its details from the original contract.

The undisputed facts of this case in so far as material to the assignments of error insisted on by the Government are that Boggs completely constructed the building prior to September 1, 1905—the contract date of completion—but that it was built in flagrant violation of the specifications. On September 1, 1905, it was inspected by the official inspector of the Indian Bureau (R. 186, 187), and was rejected, and Boggs notified thereof by letter

dated September 16, 1905 (R. 123). On September 23, 1905, demand was made on Boggs for the delivery of the building immediately and in exact accordance with the specifications (R. 130). On November 4, 1905, the building, while in possession of the contractor—having been insured by him after rejection (R. 210-213)—was destroyed by fire (R. 134). On December 28, 1905, Boggs was notified to vacate the reservation (R. 152). The undisputed facts, therefore, show an admitted failure to complete the building according to the specifications, a notice to that effect to the contractor, and a continued default, the destruction of the building, and an admitted damage to the United States in the amount of the progress payments.

SPECIFICATIONS OF ERROR.

The only two errors insisted upon by the United States in this proceeding are—

1. That specifically set out in assignments of error numbered 8, 9, 10, and 11 (R. 461, 462) to the effect that the Court erred in holding that the United States could not recover from the Surety Company the amount of the progress payments, because the relet contract differed in some of its provisions from the original contract; and

2. That specifically set out in assignments of error numbered 12 and 13 (R. 462) to the effect that the court erred in not allowing interest on the amount stipulated in the bond from September 1, 1905—the day when Boggs' default occurred.

ARGUMENT.

I.

The surety was not released by the changes in the relet contract but was liable to the extent, at least, of the progress payments.

1. At the outset it is necessary to deal with and distinguish the decision of this court in *United States v. Axman, supra*.

In order to do this, the provision of the contract in the *Axman* case relating to default and the provision on that subject in the contract now before the court should be examined, and they are accordingly set out below in parallel columns:

(*Axman contract*)

"If * * * the party of the second part * * * shall in the judgment of the engineer in charge fail to prosecute faithfully the work in accordance with the specifications and requirements of this contract * * * the party of the first part * * * shall have power to annul this contract * * * and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the

(*Boggs contract*)

"Article 4. It is further covenanted and agreed by and between the parties hereto that if the said party of the second part shall fail to complete the work herein contracted for, or any part thereof, in accordance with this agreement within the time herein provided for, or shall fail to prosecute said work with such diligence as in the judgment of the party of the first part will insure the completion of the said work within the time hereinbefore provided for, the said party of the first part may withhold all payments for work in place until final

party of the second part for completing the same * * * and the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials.'” (167 Fed. 915)

completion and acceptance of same, and is authorized and empowered, after eight days' notice thereof, in writing, to the party of the second part, and the said party of the second part having failed to take such action within the said eight days as will, in the judgment of the party of the first part, remedy the default for which said notice was given, to take possession of the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and, at the expense of said party of the second part, to complete or have completed the said work, and to supply or have supplied the labor, materials, and tools of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part and his sureties of the bond to be given for the faithful performance of this agreement shall be further liable for *any damages incurred* through such default and any and all other breaches of this contract.” (R. 66, 67)

The difference is manifest. In the *Axman* case the only provision as to the damages to be allowed in case of default was that the United States should recover the sums expended "*in completing the said contract.*" Accordingly the complaint claimed only such damages (167 Fed. 914), and the court said (p. 915):

This is not a suit to recover generally whatever damages the United States would have sustained had Axman abandoned his contract, but a suit for damages under the express stipulations of the contract, which are set forth in the complaint and made the basis of the action.

The case, therefore, was nothing more than one where the parties had expressly stipulated how the damages should be determined, and the United States had failed to observe the stipulation. It proved no damage of the kind contemplated by the contract. Accordingly, the lower court and this court held that the contractor was not liable any more than the surety. Evidently no question of suretyship was involved in the case, and, therefore, if the lower court undertook to decide—which is doubtful—that a surety is released in every case where there is a material change in the relet contract, the decision was *obiter*. This court did not pass on any such question, and, therefore, the doctrine derives no support from its decision.

Judge Gilbert, in his dissenting opinion in the present case, clearly states the nature of the de-

cision in the *Arman* case when he says (194 Fed. 619) :

In brief the decision gave effect to the rule that, if there be in the contract a provision for ascertaining the damages incurred through a violation of any of its provisions, the surety has the right to insist on its observance before being held responsible.

On the contrary, in the present case the contract expressly provided that, if the contractor should fail to complete the work, he and his surety should be liable for *any damages* incurred through such default and any other breaches of the contract. No language could be broader. It cannot be said here that the contract provided for only one kind of damages, namely, that arising from the completion of the very work contracted for. It is the ordinary case where, on default, all damages legitimately accruing within the rule of *Hadley v. Baxendale*, 9 Excheq. 341, may be allowed.

2. The doctrine announced by the Court of Appeals in the present case—if it be seriously meant, which appears doubtful—is an innovation and an anomaly in the law of suretyship. The well settled rule stated in *Miller v. Stewart*, 9 Wheat. 680, and again in *United States v. Freel*, 186 U. S. 309—upon which the lower court appears to rely—to the effect that a surety is released by any material change made, without his consent, in the original contract by the parties thereto, clearly has no application whatsoever to changes made in the relet con-

tract. The old rule, starting with the idea that a surety's contract is *strictissimi juris*—an idea having no application to modern bonding companies—correctly deduced that where a change was made in the original contract the surety could not be liable. Not on the changed contract, because he had never guaranteed that. Not on the original, because that was not the one which it was sought to enforce against him. This rule, while technical and harsh, is still easily understood.

Up to the decision in the present case, however,—and possibly the decision in the *American Bonding Company* case, 167 Fed. 910—it may be confidently asserted that no court had extended this doctrine to changes in a relet contract. The reason is obvious. Where the contractor defaults on his contract which has not been changed by the parties from the time the surety guaranteed it, his liability is at once fixed, a right of action against him has accrued, and nominal damages, at least, are due from him. The same liability in every respect falls upon the surety at the same moment. This liability and corresponding right against both the principal and the surety can only be gotten rid of by the methods known to the law, namely, release, waiver, merger, etc., and these are all bipartite. What the obligee may choose to do, after default, with a third party who has no legal relation to the principal or surety evidently cannot destroy his right against either of them. It may have an influence

in pais, as, e. g., by affecting the amount of damages to be allowed him by a jury or court, but it cannot destroy his legal right.

3. The authorities relied upon by the court below in the *American Bonding Company* case, and in the case at bar, have obviously no bearing upon the question of the *release* of a surety by a change in the relet contract. A statement of them, and of other cases follows. In *United States v. Freel*, 186 U. S. 309—an authority for some reason greatly relied upon by the court below in both cases—the sole question was whether a change in the *original* contract was of such a character as to fall outside the provision of the contract allowing changes or modifications in the plans and specifications, and it was held that it was, and consequently that the surety was released under the rule laid down in *Miller v. Stewart*, *supra*. Obviously this case lends no support to the quite novel doctrine that a change in the relet contract, after default on the original, releases the surety.

The other cases cited in the *American Bonding Company* case are equally inapplicable. In *American Surety Company v. Woods*, 105 Fed. 741, the obligee never finished the work, but sought to hold the contractor and surety, on the testimony of expert witnesses, to the amount of damages estimated by what it would have cost to complete. The case was treated entirely as one where there was no

proof of any such damage as was contemplated by the contract.

In *American Bonding, etc. Co. v. Gibson County*, 127 Fed. 671, the damages were to be ascertained and fixed by a certificate of the architect, and no such certificate was pleaded or produced. Neither case contains the slightest intimation that anything occurring between the obligee and third parties—strictly *res inter alios acta*—after admitted default could operate to release the surety.

In addition to these cases cited by the court, there are the two cases of *Chesapeake Transit Co. v. Walker*, 158 Fed. 850—reported on error as *Chesapeake Transit Co. v. Mott*, 169 Fed. 543—and *U. S. v. Weisberger*, 206 Fed. 641—another decision by the same court which decided the case at bar.

In the former, the original contract was for the construction of a steam railroad, the relet contract for the construction of a steam and electric road, and the plaintiff attempted to prove its case by expert testimony as to what it would have cost to construct the road according to the original contract. The case was submitted to the jury, which was unable to agree. The court thereupon directed a verdict for defendant, and, in overruling a motion for a new trial, placed the case upon two grounds:

1st; that the changes in the relet contract *released* the surety;

2d; that the plaintiff had produced no competent evidence of any damages.

The Court of Appeals affirmed the judgment on the second ground only, refusing to pass on the first. This clearly appears from Judge Archbald's concurring opinion (169 Fed. 546), in which he insists that the decision should be placed on the first of the above two grounds.

United States v. Weisberger was, like the *Axman* case, one where it was held that no damages such as were contemplated by the contract had been proved, and consequently that there was no liability on either *the contractor* or the surety. In its opinion the court used the following significant language (206 Fed. 645):

The law is, we think, well settled that where the government undertakes to take over work contracted to be done for it, for some breach of the provisions of the contract, and itself perform the work, or employ a third party to do so at the expense of the former contractor and his surety, the work so to be completed, in order to hold the contractor or his surety for the excess of cost, must be in substance the work that was contracted for, and must be performed without substantial departure from the contract. *United States v. Freel*, 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177; *American Bonding Co. v. United States*, 167 Fed. 910, 93 C. C. A. 310; *American Bonding Co. v. Gibson*, 127 Fed. 671, 62 C. C. A. 397; *United States Fidelity & G. Co. v. United States*, 194 Fed. 611, 116 C. C. A. 187; *Mundy v. United States*, 35 Ct. Cl. 265;

citing, as will be seen, the *American Bonding Company* case, and the case at bar as authorities. The other case cited in *United States v. Weisberger*, namely, *Mundy v. United States*, 35 Ct. Clms. 265, merely decides that if there is a substantial difference between the original and the relet contract, the latter will not afford a proper basis upon which *an estimate of damages* can be predicated (35 Ct. Cl. 288).

The decision in *United States v. Weisberger* seems to indicate either that the Court of Appeals did not fully appreciate what it had decided in the case at bar, or that it had determined to cut down its prior decisions, and as to the probability of the latter, it is significant that Judge Gilbert, who dissented in the case at bar, concurred in the remarks quoted above from *United States v. Weisberger*.

As against the decision of the Court of Appeals in this case, in *Fuller Co. v. Doyle*, 87 Fed. 687, 693, 694, Judge Adams used the following language:

The next issue tendered by the answer is whether the changes made by the plaintiff in executing the details of the work, as already specified, after Doyle had abandoned it, constitute any defense on the part of the surety. Plaintiff's cause of action accrued at the time Doyle abandoned the work, and such abandonment constitutes the breach of the bond sued on in this case. While the court must carefully consider any and all changes made in the progress of completing the work

by the plaintiff, with a view of accurately ascertaining the actual cost of finishing the very work contracted to be done by Doyle, it can not, in my opinion, treat these changes as modifications of the contract between plaintiff and defendant Doyle. Before plaintiff undertook the work, the contract had been broken by Doyle, and plaintiff's rights and Doyle's obligations under it had become fixed. If plaintiff made any changes in the details of the work in the progress of completing it, they were not made as a result of any agreement between it and Doyle, such as usually operate to discharge a surety, and such changes imposed no new or modified obligations upon Doyle. He had already failed to perform his contract, and abandoned the work, and plaintiff's cause of action had arisen thereupon, and, in my opinion, the surety's liability is in no manner affected by the fact that plaintiff, while it was doing the very work which Doyle had contracted to do, did, of its own motion, some other things, for the doing of which no claim is made against Doyle or his surety.

In *United States v. Stone, Sand and Gravel Co.*, 177 Fed. 321, 326, it was pleaded by the surety (p. 324) that the terms and conditions of the new contract differed from those of the original, and that consequently the surety was released. The court said as to this:

With reference to the new contract, no recovery is sought on it in this action. And

it is not apparent to us how the so-called "substitutions" complained of can or could in any case affect the rights or liabilities of the defendants under the original contract.

In *American Fidelity Co. v. Velie*, 196 Fed. 190, 193, the Court of Appeals for the Eighth Circuit announced the rule as follows:

According to this offer of proof, there was no claim that any change was made before the contractor breached his contract. On the contrary, the alterations proposed to be shown were limited to such as were made after the breach and after the owner had taken possession and undertaken to finish the work. They imposed no additional obligations or burdens upon the contractor which could by any possibility have induced or brought about the failure to perform his contract. That was a thing of the past. The failure had already occurred, and the owner by reason thereof was left independent and free to make such changes as he pleased, provided only he made them at his own cost and expense. All the Surety Company could be concerned in was that nothing should be charged against it on account of such subsequent additions or changes. Its liability was measured by the actual cost of the building as contracted for and by no consideration of the cost of subsequent changes. *George A. Fuller Co. v. Doyle* (C. C.) 87 Fed. 687.

In *United States v. Maloney*, 4 App. D. C. 505, 515, 516, that great judge, Chief Justice Alvey, delivering the opinion of the court, said:

Then, again, it is contended that there were changes and modifications in the plan and specifications of the work, that required an additional agreement in writing, in order to bind the parties. But this, it is clear, cannot be set up as a bar to this action. If there were any such changes and modifications in the work performed by the Government, the contract itself provides the manner of treating such changes and modifications; but they did not nullify the contract, and, at most, could only be a proper subject to be considered in estimating the damages.

It is confidently asserted, therefore, that there is no rule in the law of suretyship by which the surety is released by a change in the relet contract. The most that can be said is that where the relet contract is relied upon to fix the measure of damages, and it differs so materially from the original contract as to furnish no competent measure, there no recovery can be had either against the contractor or the surety. It is entirely another thing to hold, as the court below did in this case, that damages which could be proved against the contractor could not be proved against the surety by reason of changes in the relet contract.

4. The present case, therefore, resolves itself merely into a question of damages, *i. e.*, whether the

plaintiff showed by competent evidence such damages as were contemplated by article 4 of the contract to the amount allowed by the trial court.

The only damages allowed by the trial court were the amount of the progress payments with interest. That court refused to allow any damages based upon the difference between the amount of the original contract and that of the relet contract, because the latter differed materially from the former. The refusal of the trial court to allow anything in damages on account of the excess cost in the relet contract was made the subject of a cross writ of error by the United States from the Circuit Court of Appeals (R. 407, 418, 419), but, of course, in the view taken of the case by that court, the claim was not allowed. The refusal to allow these damages is also the subject of an assignment of error in this court (R. 463, Assignment 15), but as a favorable ruling on it by this court could have only the effect of granting a new trial, and as the contractor is insolvent, the Government can gain nothing by insisting upon this assignment, and therefore waives it.

Nevertheless, the Government does not think it proper to dismiss this particular question without comment, because undoubtedly in the trial of cases of this sort in the future it will be claimed that this ruling of the trial court is sustained by the decision of this court in the *Arman* case. From the Government's point of view, there appears to

be danger that a doctrine is growing up and will become established to the effect that, wherever, in the opinion of a trial court or an appellate court, the relet contract differs materially from the original contract, no damages at all can be recovered. That is, instead of permitting the plaintiff to explain the differences, and to furnish testimony as to what effect, if any, those differences had on the excess cost of the relet contract, it is to be held as a matter of law that such differences preclude any recovery at all.

It is submitted that the decision of this court in *United States v. Axman* lends no support to such a doctrine. That case is *sui generis*. It was there held that the stipulation as to depositing the spoil behind bulkheads was of the essence of the contract, and that therefore a new contract with a stipulation for depositing the spoil elsewhere made the work done entirely different. Moreover, the defendant had requested and been denied permission to deposit the spoil in the very place permitted in the relet contract, and his contract had been annulled largely because of his inability to perform the stipulation as to the deposit of the spoil behind bulkheads. The case was a neat case—one which seldom occurs—where a vital clause in the original contract was disregarded in the relet contract.

The doctrine announced by the trial court in this case, and apparently approved, or hinted at in decisions of the Circuit Courts of Appeal in several

circuits, can have only disastrous results to the contractor and his surety, as well as to the obligee, and this for the reason that it is a clear departure from fundamental principles—a departure which, originally adopted from the equity of a particular case, soon shows itself detrimental in cases where that particular equity does not appear.

The ordinary principle of the law of contracts is that upon a breach the injured party may recover all the damages which are the proximate result of the breach, and which he can prove by evidence sufficient in its certainty to make a *prima facie* case. No reason can be suggested why this rule should not apply to building contracts, and why it should not apply to such contracts when the United States is a party.

Ordinarily, from the nature of the case, in building contracts the damages must be measured by the difference between the price of the original contract and that of the relet contract, or not at all. In most cases, to deny the plaintiff the right to this comparison is to deny him all remedy. The result to all parties concerned may be stated shortly. In a great majority of building contracts, both the contractor and the owner learn something from the carrying out of the original contract. Even where the contractor performs in full, there are few cases where desirable changes have not suggested themselves to both parties during the progress of the work. The rule announced by the trial court in

the present case, and countenanced by Courts of Appeal, proposes to discard this experience. If the owner, in spite of the fact that the work under the original contract proves conclusively that the method therein adopted was wasteful, or inefficient, or architecturally unsound, nevertheless insists on reletting the contract on the same plans and specifications—*ipsissimis verbis*—he can recover from the contractor and his surety the excess cost increased by his wasteful method—entirely contrary to the well settled rule that a person injured contractually is bound to cut down his damages as much as possible.

On the other hand, if the owner, taking advantage of his experience under the first contract, relets upon different terms and specifications, he can recover nothing, although he prove, by evidence satisfying the test of certainty and relevancy, what is probably the difference in cost of the two contracts owing to the difference in stipulations. It is submitted, therefore, that no rule of law of the character indicated should be laid down, but that each case should be decided according to its particular circumstances, allowing the plaintiff to prove his damages by the relet contract with proper explanations and allowances, unless the difference be so great as to make it impossible to prove a *prima facie* case at all.

As to the judgment of the trial court in the case at bar for the amount of the progress payments,

that clearly is correct, assuming that our previous argument as to the release of the surety is sound. The contractor defaulted, the building was rejected, and while in the possession of the contractor was destroyed. Such loss, of course, fell on the contractor. (*American Surety Co. v. San Antonio Loan and Trust Co.*, 98 S. W. 387, 398-401, and cases there cited.) It follows that the United States received nothing, and consequently was damaged to the full amount of the payments made to the contractor during the progress of the work. Consequently there can be no doubt that the Government has suffered a damage—proximately due to the breach—to the amount of the progress payments with interest.

II.

The other defenses urged by the surety in the court below are without merit.

These defenses were three in number.

1st; that the progress payments were improperly made by the United States both as to time and manner.

2d; that the United States did not properly inspect the work during its progress, as it was bound to do.

3d; that after default, a new contract was entered into between the United States and the contractor, without the consent of the surety, extending the time of completion.

1. The decisive objection to all these defenses on the present state of the record is that none of them was pleaded. The answer of the surety (R. 27-31), while containing nine numbered paragraphs, in effect does nothing but deny specifically the allegations of the complaint. It puts in issue only those facts which the plaintiff would be bound to establish to sustain the burden of proof resting on it. But it is entirely settled that the defense of a release of the surety by dealings between the owner and the contractor must be specially pleaded. The burden of proof is on the surety to establish such a defense. *Randle v. Barnard*, 99 Fed. 348, 350; *Hayden v. Cook*, 34 Neb. 670, 677, 678; *Howard County v. Baker*, 119 Mo. 397, 407; *Patnode v. Deschenes*, 15 N. Dak. 100, 109; *Washington Slate Co. v. Burdick*, 60 Minn. 270, 271; *Sachs v. American Surety Co.*, 72 N. Y. (App. Div.) 60, 66; *United States Fidelity and Guaranty Co. v. Probst*, 97 S. W. (Ky.), 405, 406.

The rule is the same in California where the case at bar was tried. Section 437 of the Code of Civil Procedure (1907) of that state provides that the answer shall contain:

(a) A general or specific denial of the material allegations of the complaint controverted by the defendant.

(b) A statement of any new matter constituting a defense or counterclaim.

This statute, it is held, has changed the common law rule, so that special defenses cannot be proved

under the general issue, but must be specifically pleaded. *Piercy v. Sabin*, 10 Cal. 22, 27; *Michalitschke v. Wells, Fargo & Co.*, 118 Cal. 683, 689. In the former case the court said:

New matter is that which, under the rules of evidence, the defendant must affirmatively establish. If the onus of proof is thrown on the defendant the matter to be proved by him is new matter. A defense that concedes that the plaintiff *once* had a good cause of action, but insists that it no *longer* exists, involves new matter.

As to sureties, the point is expressly decided in *Bull v. Coe*, 77 Cal. 54, 62, where the court said:

The difficulty about the defense is, that it is not pleaded. The release of a surety by discharge of the principal is new matter, and must be pleaded.

It is clear that as to all the defenses made by the surety in the case at bar the burden of proof was on it, and therefore they should have been specially pleaded. The answer did no more than controvert the material allegations of the complaint going to establish the plaintiff's case, and therefore the surety was confined to defenses directly controverting the case made by the plaintiff.

2. Another objection to all these defenses of the surety is that it is nowhere pleaded or proved that the surety was damaged in any way by what it is claimed was done by the United States. It is true that this was immaterial under the old law re-

lating to the ordinary volunteer surety, but the rule *strictissimi juris* has been relaxed as to professional bonding companies who make a business of suretyship for a compensation to the extent of requiring them to show damage accruing to them from acts of the owner claimed to release them. *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 416, 426; *Hill v. American Surety Co.*, 200 U. S. 197, 202; *Atlantic Trust Co. v. Laurinburg*, 163 Fed. 690, 695, 696 (C. C. A. 4th C.); *Baglin v. Title, etc. Co.*, 166 Fed. 356; *United States Fidelity and Guaranty Co. v. United States*, 178 Fed. 692, 694, 695 (C. C. A. 3d C.); *United States v. Lynch*, 192 Fed. 364 (and cases cited on p. 368).

As stated above, there is not one particle of evidence in the record tending in any way to show that the surety in the case at bar was damaged by anything done by the United States in regard to the manner in which payments were made, or in which the work was inspected, or in its treatment of the principal after default. In the absence of such proof, it is submitted that these defenses are not available to the surety under the above decisions. It is true that as to the defense of an improper inspection, perhaps damages to the surety might be presumed. Yet even as to this defense, it is submitted that some proof should have been offered of actual damage to the surety, and at any rate—as will be shown later—there was no obligation on the part of the United States to inspect the work

during its progress, and therefore any damage accruing to the surety from failure to inspect would be *damnum absque injuria*.

3. None of these defenses of the surety has any merit.

(a) As to the progress payments, they are governed by article 9 of the contract (R. 68), where the United States agrees to pay on the presentation of proper receipts or vouchers the sum of \$12,709 as follows; eighty per centum of the work *executed and actually in place* to the satisfaction of the party of the first part *at the expiration of each thirty days during the progress of the work, the amount of each payment to be computed upon the actual amount of labor and materials expended during the said period* of thirty days for which partial payment is to be made—the said value to be ascertained by the United States.

It is evident that the period of thirty days must be computed from the time when work began on the building, and not from the time when quarrying began, because the payments are based only on work “executed and actually in place,” and until building began no such work could exist. Work on the building began May 8th (R. 299), a first estimate under article 9 of the contract was made May 23rd (R. 141), and payment on said estimate made on June 10th (R. 140)—almost exactly thirty days after the work began. The second estimate was made June 30 (R. 143), and payment on it made

July 21st (R. 140). Both estimates were furnished at the time the contractor's agent requested them (R. 299). It is true that in the latter case, payment was not made until more than thirty days after the first payment, but the United States only agreed to pay "on the presentation of proper receipts or vouchers." The contractor got his estimate on June 30th, and there is no evidence as to when he presented it for payment. *Non constat* that he neglected to present it till July 21st, in which case clearly the United States could not be held to have violated the provisions of the contract.

It is submitted the evidence shows a substantial compliance with the contract. The true intent of the rule as to sureties and progress payments, is that the owner shall not make them *sooner* than the contract provides, so as to release a fund which should be held to insure performance. Where the payments are made after the time stipulated, the surety has no just ground of complaint, however it may be with the contractor.

It was further claimed by the surety that the payments were not eighty per centum of the value of the work executed and actually in place, but the evidence shows that substantially they were—and the trial court so found (R. 46, 47, Finding IX). The only evidence on the subject is in the testimony of Perkins, Smith, and Mulford (R. 146, 204-209, 299, 300). It is to the effect that the payments were eighty per centum of the work in place, except

that possibly some lumber lying on the ground might have been included.

(b) The claim that the surety was released because the United States failed properly to inspect the work during its progress is equally without merit, because the contract placed no such obligation upon the United States either for the benefit of the surety, or at all. The provision of the contract relating to it is article 5 (R. 67), whereby it is agreed that the materials delivered and work done under the contract "shall be *subject* to the inspection of " the United States. A similar provision is contained in article 26 of the specifications (R. 75), and article 23 of the specifications (R. 75) provides that partial payments are in no way to be considered as an acceptance of any work or material included in the contract.

It is clear, therefore, that the contract merely reserves to the United States a *right* or *option* to inspect, for its own benefit. The surety, having guaranteed the faithful performance of the contract by Boggs, cannot complain because the obligee did not see to it that Boggs did what the surety had engaged he would do. The following authorities are decisive. *United States v. Kirkpatrick*, 9 Wheat. 720, 736; *United States v. Vanzandt*, 11 Wheat. 184, 188; *Dox v. The Postmaster General*, 1 Pet. 318, 325; *Pittsburg, etc. Ry. Co. v. Shaeffer*, 59 Pa. St. 350, 356; *Mayor, etc. of Durham v. Fowler*, 22 Q. B. D. 394; *Kingston v. Harding*, (1892) 2 Q. B. 494.

(c) The claim that the United States, after default, extended the time for completion, or entered into a new contract with Boggs, or prevented Boggs from carrying on the work, has no support in the evidence. It is impossible, in the proper compass of a brief, to go into these defenses at any length. It can only be said that after the building was rejected, there was an effort made to have Boggs complete it according to the specifications [R. (277-280), (317, 318), (156, 157, 158), (125-128), 290, 320, (131-133)]. No agreement was ever come to as to the manner in which it should be reconstructed, as the above citations from the evidence show, and while the matter was in this predicament, the building burnt. After that there is no evidence at all of any real attempt to do business with Boggs, and he was finally ordered to leave the reservation. Clearly, the evidence shows no meeting of minds on a new contract of any sort, or any dealings by the United States with the contractor which were not honorable and fair in every respect.

But even if it were otherwise, the surety is met with the difficulty that a new agreement or arrangement with the contractor after default could only be made on behalf of the United States by as high an authority as that under which the original contract was executed. All the acts upon which the surety relies to affect the United States were done by Perkins, who was merely superintendent of the school (R. 159), and of the construction of it (R.

99). It cannot be claimed that the Indian Office ever did anything in relation to Boggs, except to insist that he should build the mess hall according to the plans and specifications (R. 272, 275, 276, 277-279, 280, 281, 282, 332). It follows that, no proof being offered or even pretended of any authority on the part of Perkins to bind the United States to any new agreement with Boggs after default, or to take any action towards Boggs after that event which should in any way affect the rights of the Government, the case of the surety upon this point entirely fails.

III.

The United States is entitled to interest on the penalty of the bond from September 1, 1905, the date of default, or at least from January 16, 1906, when the surety was notified of such default.

At the outset it should be noted that this is not a case, in so far as the decision and allowance of the court below are concerned, of unliquidated or non-ascertainable damages. Prior to default, the United States had paid the contractor specific amounts on specific dates, namely, on June 10, 1905, \$4,356.24, and on July 21, 1905, \$3,539.16, an aggregate sum of \$7,895.40. Since Boggs wholly failed to perform his contract and the building was destroyed while in his possession, this amount was entirely lost to the United States, and constituted an item of damages fixed, ascertained and separable from the other

demands of the Government, and in excess of the penalty of the bond. It was made the subject of a separate allegation and prayer in the complaint (R. 18, 19), and was the only amount allowed by the trial court. It is true that the surety pleaded a set-off (R. 35-38), for the value of materials belonging to Boggs, and taken possession of by the United States under article 4 of the contract (R. 66), and that the court allowed this set-off in the sum of \$2,418.58 (R. 50, 52). This, however, did not prevent the claim of the United States from being, on default, an ascertained sum, on which interest would run against the surety even to an amount in excess of the penalty of the bond, provided interest can ever be allowed against a surety under such circumstances. That the claim of the surety against the United States—which was in effect on a *quantum valebat*—was perhaps unliquidated does not make the original claim of the United States unliquidated. It may render doubtful the amount of the final judgment in favor of the United States after the balance is struck of debits and credits, but it cannot prevent the allowance of interest on an item of indebtedness which is clearly fixed and ascertained. That amount is a settled charge against the surety, and the fact that the surety may be able to offset it by claims of its own cannot destroy its original nature, nor deprive it of the ordinary incidents of liquidated demands. It may be noted that the trial court allowed as against the contractor interest on the progress pay-

ments from the time they were made, and as against the United States interest on \$2,418.58 from the time the materials were seized by the United States (R. 55).

That interest on the penalty of a bond may be allowed, at least in the case of liquidated claims or of claims the amount of which can be ascertained by mere calculation, seems established by the following authorities: *Perit v. Wallis*, 2 Dall. 252; *United States v. Arnold*, 1 Gall. 348, 360; *affd.* 9 Cranch, 104, 120; *United States v. Quinn*, 122 Fed. 65; *Williams v. Willson*, 1 Vt. 266; *Judge of Probate v. Heydock*, 8 N. H. 491, 494; *Wyman v. Robinson*, 73 Me. 384, 387; *Carter v. Thorn*, 18 B. Mon. 613, 619, 620. There are authorities which look the other way, but they appear to be cases where either the damages were wholly unliquidated or no notice of the default had been received by the surety. In the ninth edition of Sedgwick on Damages (1912), section 678, the following statement of the law is made:

But there has been more doubt on the question of recovery of interest on the penalty. At one time the American rule to be deduced from all the cases seemed to be that against a surety in *debt on bond* nothing could be recovered beyond the penalty; that against the principal in that form of action, interest might perhaps be recovered beyond the penalty; while in England the penalty in all cases, except perhaps in equity, was the absolute limit.

The later authorities, however, take an entirely different view. The better opinion now is, that interest may be recovered, in addition to the penalty, in an action whether against the principal or the surety. In *Lyon v. Clark*, it is pointed out, in the very clear opinion of Comstock, J., that there is a distinction between the question whether, at the time of the default, the liability can exceed the penalty, and the question whether, after default, interest can be allowed in excess of the penalty. The first is a question of the effect of the contract; the second is one of compensation for a breach of the contract. This distinction appears to be perfectly sound, and upon the whole there seems no reason why interest on the penalty should not be allowed. In a few States, however, the recovery is still limited to the penalty without interest.

It may be noted that the bond in suit is apparently a California contract (R. 20). No California decisions on the subject of allowing interest on the penalty in a bond are cited by Sedgwick *loc. cit.*, and we have not been able to find any. Section 3287 of the California Civil Code (1905) provides:

Every person who is entitled to recover damages certain, or capable of being made certain by calculation and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.

It is submitted that the case at bar falls within this provision of the California statutes.

In *Mix v. Miller*, 57 Cal. 356, interest was allowed under section 3287 of the Code in an action on a *quantum meruit* where the claim did not differ in its nature from that pleaded as a set-off by the surety in the case at bar. And see *Martin v. Ede*, 103 Cal. 157, and *Ryland v. Heney*, 130 Cal. 426, 429, 430.

CONCLUSION.

The judgment of the Circuit Court of Appeals should be reversed, and judgment rendered in favor of the United States against the Surety Company for \$6,500, with interest either from September 1, 1905, or from January 16, 1906.

JOHN W. DAVIS,
Solicitor General.
W. C. HERRON,
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NOVEMBER, 1914.

No. 125

Office Supreme Court, U. S.

FILED

JAN 12 1915

JAMES D. MAHER

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1914.

THE UNITED STATES,
Plaintiff in Error,

vs.

THE UNITED STATES FIDELITY AND GUARANTY
COMPANY OF BALTIMORE, MARYLAND,
AND AUGUSTUS W. BOGGS,
Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

**Brief for the United States Fidelity
and Guaranty Company.**

J. KEMP BARTLETT,
*Attorney for United States Fidelity &
Guaranty Co.*

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 125.

THE UNITED STATES,
Plaintiff in Error,
vs.

THE UNITED STATES FIDELITY AND GUARANTY
COMPANY OF BALTIMORE, MARYLAND,
AND AUGUSTUS W. BOGGS,
Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

**Brief for the United States Fidelity
and Guaranty Company.**

STATEMENT OF THE CASE.

On February 23, 1905, C. F. Larrabee, Acting Commissioner of Indian Affairs, entered into a written contract on behalf of the United States with Augustus W. Boggs, of Riverside, California, whereby the latter agreed—

“to furnish all of the labor and materials and do and perform all the work required to construct and complete a stone mess hall and kitchen at the Rice Station School, Arizona,”

in accordance with the terms of an advertisement therein referred to, and of certain plans and specifications thereto attached. (Tr. pp. 63-96.)

The contract price was \$12,709.00, payable as follows:

"Eighty (80) per centum of the value of the work executed and actually in place to the satisfaction of the party of the first part at the expiration of each thirty (30) days during the progress of the work, the amount of each payment to be computed upon the actual amount of labor and materials expended during the said period of thirty (30) days for which partial payment is to be made (the said value to be ascertained by the party of the first part); and the balance thereof will be retained until the completion of the entire work, and the approval and acceptance of the same by the party of the first part, which amount shall be forfeited by the said party of the second part in the event of the non-fulfillment of this contract; it being expressly covenanted and agreed that said forfeiture shall not relieve the party of the second part from liability to the party of the first part for any and all damages sustained by reason of any breach of this contract." (Tr. p. 68.)

The contract provided that the contractor should

"not be allowed any additional compensation for labor or material unless he receives written authority from the Commissioner of Indian Affairs, and the price agreed upon before execution of the work." (Tr. p. 65.)

The time for completing and turning over the entire work was fixed by the contract as September 1, 1905. (Tr. p. 64.)

A penalty of \$20.00 per day, to be deducted from the contract price, was provided for delay in completing the work in accordance with the plans and specifications (Tr. p. 64), and it was further agreed as follows (Tr. p. 66):

"That if the said party of the second part shall fail to complete the work herein contracted for, or any part thereof, in accordance with this agreement within the time herein provided for, or shall fail to prosecute said

work with such diligence as in the judgment of the party of the first part" (the Acting Commissioner of Indian Affairs) "will ensure the completion of the said work within the time hereinbefore provided for, the said party of the first part may withhold all payments for work in place until final completion and acceptance of same, and is authorized and empowered, after eight days' notice thereof, in writing, to the party of the second part, and the party of the second part having failed to take such action within the said eight days as will, in the judgment of the party of the first part, remedy the default for which said notice was given, to take possession of the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and, at the expense of said party of the second part, to complete or have completed the said work, and to supply or have supplied the labor, materials and tools of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part and his sureties of the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this agreement."

The specifications provided that the contractor

"must, at his own expense, within a reasonable time, remedy any defective or unsatisfactory materials or work, and that in the event of his failure to do so, after notice, the same will be remedied at the cost of the contractor." (Tr. p. 75.)

It was further provided by the contract that

"the materials delivered and the work done under this contract shall be subject to the inspection of the party of the first part, or of other person or persons appointed by him, with the right to reject any part thereof not in accordance with this contract; and the decision of the said party of the first part shall be final." (Tr. p. 67.)

The following powers were given to and duties imposed upon "the Commissioner of Indian Affairs or his representative" by the specifications:

(a) The work was to be executed under the direction and to the entire satisfaction of him or his representative, and in conformity with his instructions. (Tr. p. 70.)

(b) He or his representative was to be the final interpreter of the intent and meaning of the plans and specifications. (Tr. p. 70.)

(c) The contractor was required to submit all discrepancies in figures or drawings to him or to his representative for decision. (Tr. p. 71.)

(d) The contractor was required promptly to inform "the representative of the Commissioner of Indian Affairs in charge of the work" of any errors or discrepancies discovered. (Tr. pp. 71-2.)

(e) The Commissioner or his representative was given the right to discharge workmen, and "to have at all times access to the work, which is to be entirely under his control." (Tr. p. 72.)

(f) The consent of the Commissioner or his representative was required for the use of stoves while plastering was in progress. (Tr. p. 72.)

(g) Materials were required to be of the best quality and labor to be done in the most thorough, prompt and workman-like manner, "to the full satisfaction of the Commissioner of Indian Affairs or his representative." (Tr. p. 73.)

(h) He or his representative was to decide on "the best and most suitable article to use" in case of specifications in general terms. (Tr. p. 73.)

(i) Detail drawings were to be furnished of such parts of the work as he or his representative might desire to explain more fully, and without them, the contractor might be required by him or his representative to tear down the work. (Tr. p. 73.)

(j) The contractor was to work "in such order and places" as might be required by the Commissioner or his representative. (Tr. p. 74.)

(k) The Commissioner was given the right to make changes in the work, his decision to be final in case of dispute as to price, and the contractor not to be allowed additional compensation without written authority from the Commissioner, and a previous agreement as to the price. (Tr. p. 74.)

(l) All materials and work, at all times during the progress of the work, were to be "subject to the inspection of the Commissioner of Indian Affairs or his representative, with the full right to accept or reject any part thereof." (Tr. p. 75.)

The specifications required the work to be completed by August 1, 1905 (Tr. p. 77), but the contract fixed September 1, 1905, as the date of completion. The contract was signed after the specifications had been prepared (Tr. p. 96), and the plaintiff in error admits and the trial Court found that the contract governs in this respect. (Complaint, Tr. p. 7; Findings, Tr. pp. 42 and 344.)

On March 11, 1905, the contractor, Augustus W. Boggs, as principal, and the plaintiff in error herein, as surety, executed a bond in the sum of \$6,500.00, to the United States, conditioned that said Boggs should "in all things well and truly observe, perform, fulfill, accomplish and keep all and singular the covenants, conditions and agreements whatsoever," mentioned in the aforesaid building contract of February 23, 1905. (Tr. p. 200.)

Work was commenced under this contract on April 12, 1905 (Mulford, Tr. p. 292; Findings, Tr. p. 345). It continued uninterruptedly until about the 16th or 18th of August, 1905, when the construction was completed. (Perkins, Tr. p. 145; Kincaid, Tr. p. 184; Hopper, Tr. p. 310.)

Throughout the entire time involved in this case the representative of the Commissioner of Indian Affairs on the ground in charge of the work on behalf of the Government was one James S. Perkins (Perkins, Tr. pp. 98, 99, 137, 147, 167), who, as superintendent of the Indian school, resided about 150 yards from the place of construction (Perkins, Tr. p. 138), and visited it every day (Perkins, Tr. pp. 138, 139; Kineaid, Tr. p. 181; Hopper, Tr. pp. 303-4; Mulford, Tr. pp. 295, 296; Rolland, Tr. p. 312).

Another representative of the Commissioner, employed as an inspector during the progress of the work, was one Robert A. Smith, who, as engineer at the Indian school, resided there, and was appointed by Perkins to assist him in the inspection and did inspect the work during its progress daily from the beginning of actual construction. (Smith, Tr. pp. 202-3-4; Perkins, Tr. p. 140; Hopper, Tr. pp. 303-4; Mulford, Tr. pp. 296-7.)

Prior to September 1, 1905, there was no representative of the Government on the work, except the aforesaid Perkins and Smith (Perkins, Tr. p. 150); but one William R. Carroll, a carpenter employed by the Government at the Indian school, was about the work every day throughout, helped in the construction at times, and reported after a certain period to Perkins as to the character of the work. (Perkins, Tr. pp. 99, 134, 138, 148, 149; Hopper, Tr. p. 303; Mulford, Tr. p. 298.)

William Mulford was in charge of the construction for the contractor from the beginning, April 12, 1905, to July 6, 1905, when he left. (Tr. p. 292.)

On May 23, 1905, an estimate for the first payment to the contractor, in the sum of \$4,356.24, was made by Perkins and Smith, "being eighty per centum of the value of the work executed and actually in place as provided in section 9 of said contract," and the following certificates were appended thereto (Tr. p. 142):

"I certify on honor that I have carefully inspected for the Indian Department work described in the foregoing, and find it to be actually in place and of the value represented; that it has been done in a workman-like manner and that the stipulations of the contract have so far been fully complied with.

"Dated at Rice Station School, Talklai, Arizona, May 23d, 1905.

"ROBERT A. SMITH, *Engineer.*

"I certify on honor that the foregoing account of Augustus W. Boggs is correct and just; that the work has been carefully inspected by Robert A. Smith, whose certificate appears above; that the stipulations of the contract have so far been fully complied with; that there is now due the said Augustus W. Boggs four thousand, three hundred and fifty-six dollars and twenty-four cents, and that I have issued this voucher in duplicate only.

"Dated at Rice Station School, Talklai, Arizona, May 23d, 1905.

"J. S. PERKINS, *Superintendent.*"

The total value of "the work executed and actually in place" was certified as above to be, on said date, \$5,445.30.

No payment was made, nor voucher issued for any payment, at the expiration of any period of thirty days during the progress of the work. The first voucher above mentioned was issued on the 41st day after April 12th, the date when work commenced. The next and last voucher was issued, as we shall see, on June 30, 1905, the 79th day after commencement of the work.

On June 10, 1905, the United States paid to the contractor the sum of \$4,356.24, the amount called for by the above certificate (Complaint, Tr. p. 14; Findings, Tr. p. 348; Perkins, Tr. p. 140), on the faith of said certificate and the representations made thereby. (Perkins, Tr. p. 140; Smith, Tr. pp. 208-9.)

On June 30, 1905, a second and last estimate was made, for a payment in the sum of \$3,539.16, "being eighty per centum of the value of the work executed and actually in place, as provided in section 9 of said contract." To this estimate were appended, as in the previous case, a certificate of the said Smith and a certificate of the said Perkins, both in the same language as before. The estimate showed the "value of the work executed and actually in place" on June 30, 1905, and since May 23, 1905, to be \$4,423.95; making a total value to June 30, 1905, of work constructed in a workmanlike manner, and in full compliance with the contract, of \$9,869.25. (Tr. pp. 142-3.)

The entire contract price being \$12,709.00, these certificates, made by the representatives of the Commissioner of Indian Affairs, on the ground, mean that more than 77½ per cent of the whole work had, up to June 30, 1905, been installed in an entirely satisfactory manner.

On July 8, 1905, eight days after Smith and Perkins had certified on honor that all work up to date had been constructed in full compliance with the contract, and that Boggs was entitled to another payment for his faithful work, the same Perkins wrote to Boggs a letter saying: "For your information and future benefit I submit an itemized list of discrepancies in the building now under construction by you at this place," and specifying six items, relating to the purlins (which are horizontal beams supported by the principal rafters of the roof and supporting the common rafters at right angles), to the hip and valley rafters, to the ceiling and wainscoting, to the wall-plates and anchor bolts, to the stoop floors, and to the window sash; and hinting of objections to the chimneys, plastering and hearths. (Tr. p. 168.)

On July 21, 1905, thirteen days after the foregoing letter, the auditor of the Interior Department wrote to Boggs, stating that his claim for \$3,539.16 (the amount of the certificate of June 30, 1905) had been allowed that day by the

auditor, and that a warrant would be issued in payment in due course of business. (Tr. p. 171.)

At some time thereafter, not definitely appearing, but perhaps on the same day or within a few days, the warrant for payment was duly mailed to Boggs, on the faith of the certificates made by Perkins and Smith on June 30, and of the representations therein contained, as both of them knew would be the case. (Perkins, Tr. p. 140; Smith, Tr. pp. 208-9.)

Perkins did not, between June 30th and July 21st, advise the Department of any defect in the construction. (Perkins, Tr. p. 172.) No steps of any kind were taken to prevent Boggs' obtaining a warrant for payment on the certificate of June 30th, or realizing on that warrant when obtained.

On July 21, 1905, Perkins for the first time, by letter of that date, advised the Commissioner that there was anything defective about the work; and the Commissioner replied to said letter and wrote to Boggs for the first time in reference to defects, on July 31, 1905. (Tr. p. 272.) Perkins' letter of July 21, 1905, to the Commissioner, complains about the size of the wall-plates, the total omission of anchor-bolts, the omission of one purlin altogether and the defective size of the other, the size of the wainscoting and ceiling, the omission of bridging between joists, the omission of quarter-sawn flooring, the defective size of flooring for stoops, the insufficiency of the hearths which "must come up," the size of the hip and valley rafters, the use of improper doors, and the quality of the window sash. (Tr. p. 273.)

On July 23, 1905, Perkins wrote to Boggs, complaining about the doors, window sash, ceiling, wainscoting, flooring, joists, plumbing and hearths. (Tr. p. 101.)

On the same day (July 23, 1905) Perkins wrote another letter to Boggs, complaining about the plastering having been stopped at the top of the wainscoting instead of going to the floor, and charging him with having omitted 445 square yards of plastering. (Tr. p. 106.)

Thereafter Perkins wrote to Boggs five times prior to September 1, 1905, complaining in detail about the defective character of the work, comprehending the following items: Framing next to smoke flue and plastering on outside of chimneys (Tr. p. 102); plastering generally throughout the building and bracing of roof on rear building (Tr. p. 107); chimneys, partition walls, roof, plastering, wainscoting, ceiling, window sash, window frames, window glass, sash weights (Tr. p. 108); gables, shingles, frieze, slats on ventilators (Tr. p. 109); height of walls, roof, purlins, bolts, rafters, wall-plates, anchor-bolts, partition walls, chimneys, plastering, both as to its quality and as to its stopping at the wainscoting, wainscoting, nailing strips, window frames, door frames, window glass, joists, stoop-floors, treads of steps, flooring, flooring joists, ventilators, ceiling lumber, gables, hearth borders, hearths, window weights, ice box, cornice, batten doors, bridges. (Tr. p. 110.)

On July 27 (Tr. p. 276), August 2 (Tr. p. 275), and August 10 (Tr. p. 314), Perkins wrote to the Commissioner about the defective work and received replies dated August 5 (Tr. p. 276) and August 12 (Tr. p. 275), instructing him not to issue vouchers to the contractor for any further work and not to accept the building unless properly built, and directing him to notify the Commissioner when the building was said to be completed.

As already stated, the building was finished by the contractor on August 16 or 18, 1905.

From September 2d to September 7, 1905, it was inspected by John Charles, specially sent by the Commissioner for that purpose. In this work he was assisted by Perkins (Tr. pp. 187, 194). He rejected the building, and Perkins notified Boggs of the rejection by letter dated September 16, 1905. (Tr. p. 123.)

Inspector Charles used, in making the inspection, a list of discrepancies and defects furnished him by Perkins, and found it substantiated in the main. (Tr. p. 187.)

The most substantial objections related to the manner in which the roof was constructed, the height of the walls, the height of the building, the plastering, the chimneys, the failure to bond the walls, and the improper fitting of the stone work. (Tr. pp. 191, 195, 196.)

All of this portion of the construction had been installed prior to June 30, 1905, the date of the last certificate of Perkins and Smith declaring on honor that the work had been done faithfully and in full compliance with the contract up to that time. (Perkins, Tr. pp. 145, 146, 147, 148; Smith, Tr. p. 208; Hopper, Tr. p. 303; Mulford, Tr. pp. 294, 295; Rolland, Tr. p. 311.)

All these discrepancies were easily discernible by any person competent to understand the plans and specifications, and the errors in fitting the stones throughout the building and in bonding the walls were in particular glaring and apparent at a glance. (Charles, Tr. pp. 191, 192, 194, 195, 196.)

After the rejection, the United States Government did not take possession of the building, but permitted it to remain in the possession of the contractor. (Complaint, Tr. p. 15; Findings, Tr. p. 350.)

On September 24th, 1905, Boggs wrote to Perkins declaring his readiness to do the work over, and asking more time for that purpose. (Tr. p. 155.) On September 29, 1905, Perkins telegraphed the substance of this letter to the Commissioner, and on the same day wrote Boggs stating that if any more work was done Boggs must furnish accommodations for the men and all necessary tools and materials; that he (Perkins) wanted the building torn down and put up in exact accordance with the specifications; that he wanted Boggs to get busy and that he demanded the delivery of the mess hall immediately in exact accordance with the specifications. (Tr. pp. 316, 317.)

On October 3, 1905, Perkins again wrote Boggs in relation to the latter's letter of September 24, stating that he would not receive the building until erected in exact accordance with the specifications, that the walls must come down and be built up properly, all partitions be bonded, all walls made true, all windows and door frames properly made and built into the walls according to specifications, nailing strips provided for finish, etc., that only three parts of the work had been properly done, the painting, the plumbing and the shingles, that there must be some evidence of activity at once, and that nothing would be considered except the erection of the building at the very earliest possible date in exact accordance with the specifications. (Tr. p. 156.)

On October 8, 1905, Boggs announced to Perkins by letter his intention to commence rebuilding the following week, and on October 11, 1905, Perkins advised the Commissioner by telegram of Boggs' letter. (Tr. pp. 128, 319.) On the same date he wrote to the Commissioner, forwarding Boggs' letter and stating that three men had arrived to begin work, and stating that he had told them that nothing would be tolerated but the erection of the building in exact accordance with the plans and specifications, also that he had no objection to their beginning work, and that he had no orders from the Commissioner to stop them. (Tr. p. 319.)

On the next day, October 12, 1905, Perkins wrote again to Boggs, requiring him to say at once whether he intended to rebuild the mess hall immediately in exact accordance with the specifications. (Tr. p. 157.)

Boggs went to Rice Station about October 17, 1905 (Tr. p. 126), and had a talk with Perkins, in which the latter authorized him to go ahead with the reconstruction, and assented to his putting the building into condition. (Tr. p. 285.) The work of reconstruction had already commenced. (Perkins, Tr. p. 150.) This work commenced about October 14, 1905 (Hopper, Tr. p. 302), and continued to November

4, 1905, when the building, while still in the possession of Boggs, was destroyed by fire. (Tr. p. 304.) Boggs' men took up the floors, took out the sash frames, took the doors off, took the door frames off, took off the plastering and cut out some wainscoting and were in the midst of this work when the fire occurred. (Tr. pp. 304, 312.) Hopper and Rolland were doing the carpenter work and two Indians were employed taking off plaster and taking nails out. (Tr. p. 313.) They all worked every day except Sundays during that period. (Tr. p. 313.) When the fire occurred, they had the floors up, the windows out, the window frames out, the doors out, the door jambs off, the wainscoting off, the plastering all off, and the chimneys down. (Tr. p. 313.) Perkins made no objection at any time to what they were doing (Tr. pp. 306, 313), though he was about the work every day (Tr. p. 304), but on the contrary he stated in the presence of Rolland that the work must conform to the plans and specifications (Tr. p. 313), and on various occasions he said to Hopper that it must conform absolutely to those plans and specifications, gave him directions and made suggestions about the manner in which particular work should be done, stated to him that he was satisfied with their work of tearing down and getting ready to reconstruct, and discussed with him, in particular, one matter relating to wood sills and wood caps. (Tr. pp. 304, 305, 306.)

On October 17, 1905, Boggs notified the Commissioner by letter from Rice Station that he was on the ground with men and materials to tear down and make good all defects. (Tr. p. 126.)

On October 19, 1905, Perkins wrote to Boggs stating that the Commissioner, on October 13, had instructed him to say that if Boggs expected to reconstruct the mess-hall and not make a few changes, he, the Commissioner, was willing that that be done, and that the Commissioner had said that if the building was erected as specified, it might be accepted, but

that no half-way measures would be accepted by the Indian Office. (Tr. p. 320.)

On October 21, 1905, Perkins wrote to the Commissioner regarding the plaster proposed to be used by Boggs. (Tr. p. 321.)

On the same day he wrote the Commissioner stating that he had forwarded to the latter a copy of a letter from himself to Boggs (evidently the letter of October 19), that he had informed Boggs that no halfway measures would be accepted by the Department and that on the date of writing he had told Boggs personally that he must do this work in exact accordance with the specifications and stating further that with the backing of the office he would make Boggs put up the building properly at an early date, according to contract, and that he intended to make Boggs get busy and give him the building in proper shape at as early a date as possible. (Tr. p. 322.)

On October 23, 1905, Perkins wrote Boggs, saying he was sending a sample of yellow pine, the flooring specified, and stating that Oregon fir would not fill the bill. (Tr. p. 158.)

On October 25, 1905, Boggs wired the Commissioner asking whether he might use Oregon pine flooring instead of yellow pine. (Tr. p. 321.)

On October 27, 1905, the Commissioner wired Boggs to the following effect (Tr. p. 131):

"Mess hall at Rice Station must be reconstructed in exact accordance with the plans and specifications. No variations will be permitted."

On the same day the Commissioner wrote Boggs a long letter confirming his telegram and replying to the latter's letter of October 17. The Commissioner states that the office expects Boggs to follow exactly the plans and specifications already furnished him for the reconstruction of the building, that no departures will be allowed, that unless the building

is constructed exactly as specified it will not be accepted, that if it is necessary to tear down the walls in order to make the building as it should be, the Office can give him no relief, and that nothing will be accepted but the building as required. (Tr. p. 131.)

On the same day the Commissioner sent a copy of this letter to Perkins, instructing him to notify Boggs and the Indian Office in case any of the reconstructed work should not be up to specifications. (Tr. p. 277.)

On October 30, 1905, the Commissioner wrote to Perkins, repeating that the building must be erected as specified, otherwise it would not be accepted, stating that if the walls were faulty they must come down, and that no inferior work would be accepted nor substitutions permitted, and instructing Perkins to notify Boggs to this effect and also to the effect that the Office desired the building turned over to the Government at as early a date as possible. (Tr. p. 280.)

Perkins testifies that the instructions given him by the Department were in all cases carried out by him, and that whenever these letters instructed him to notify Boggs of anything he did so. (Tr. p. 283.)

On November 3, 1905, the day before the fire, Boggs wrote Perkins, asking what brand of plaster he wanted, and stating that he, the writer, intended raising the roof and adjusting timbers as per plans, increasing the walls in height, building frames into wall, and bonding partitions. (Tr. p. 129.)

On the next day, November 4, 1905, the building was, as already stated, destroyed by fire. In October Boggs had had the building insured for his own benefit in the sum of \$8,000.00, and after the fire he collected \$6,000.00 from the fire insurance company, and retained it. (Tr. pp. 211, 212, 213, 286.) The Government received no part of this sum, took no measures to secure it, and maintained no fire insurance on the building on its own account, the building being, as previously shown, by its own action and consent, out of its possession since September 1st.

After the fire Boggs' men remained on the ground, and under his instructions went to tearing down the walls and cleaning up, preparatory to rebuilding. Hopper communicated to Perkins Boggs' instructions in this regard, and no objection was made. The building being completely gutted, they took down the walls, cleaned off the stone, took out the sewer pipe on Perkins' instructions, and cleaned it out. Perkins ordered Hopper to tear out the foundation, and re-lay it, and said it would not do to build on the old foundation again. (Tr. p. 305.) After the fire Perkins was about the place the same as before, back and forth every day. After the fire he repeated his direction to Hopper that it was to comply absolutely with the plans and specifications. (Tr. p. 306.) This work of reconstruction was begun on November 22, 1905 (Tr. p. 281), as soon as Boggs had obtained an adjustment of the fire insurance. (Tr. p. 286.)

On November 20, Perkins wired the Commissioner that Boggs had taken no steps toward rebuilding, and on November 22 he wired the Commissioner that Boggs had begun reconstruction that day. (Tr. p. 281.)

On December 1st, the Commissioner wired Perkins as follows (Tr. p. 281):

"Boggs matter before Department for instructions. When received will communicate them to you. Meanwhile be careful not to commit the Government in any way."

On December 19, the Commissioner wrote to Perkins, directing him to notify Boggs and his representatives to vacate the premises and in the event of their failure to go at once, to call on the Indian Agent to expel them. (Tr. p. 282.)

This letter was received by Perkins on December 24. (Tr. p. 325.) Hopper was about the place between that date and December 28, but Perkins said nothing to him about it between those dates. (Perkins, Tr. p. 284.) The work of reconstruction was proceeding uninterruptedly up to December 28. (*Ibid.*)

On December 29, 1905, in the evening, Perkins served a written notice on Hopper, dated December 28 (Tr. p. 306), and mailed a similar one to Boggs, ordering them to vacate the San Carlos Reservation at once, and to leave intact all of the material and property furnished by the contractor for the building. (Tr. pp. 152, 327.)

Thereupon work at once stopped, the men left, and Perkins seized all the materials and tools he could find. In his letter to the Commissioner of January 2, 1906 (Tr. p. 325), he reported as follows:

"I seized the following material and it is all here at the school: Hopper's tool chest; two boxes of hardware; 12 kegs of nails; 8 truss rods with washers; 26 rolls building paper; all the stone that was in the building; 10 yards of sand; 5400 lbs. of lime; 3 carloads of lumber and shingles. The material is worth several thousand dollars."

The lumber arrived in the cars about December 25, and was unloaded on the 28th, after Perkins received his instructions from the Department and before he notified anyone of them. (Tr. p. 291.)

The confiscated materials belonging to Boggs were of the value of \$2,418.58. (Findings, Tr. p. 351.)

On January 16, 1906, the Government notified the United States Fidelity & Guaranty Company, the defendant in error, by letter of that date from the Commissioner, that the building had been rejected when offered by the contractor, and that on November 4, 1905, it was completely destroyed by fire while in the hands of the contractor's representatives. It was stated that suit on the bond was about to be brought and that the papers were then being prepared for that purpose. (Tr. p. 332.)

On May 31, 1906, the Commissioner wrote the Secretary of the Interior to the effect that the Comptroller of the Treasury reported that *the books of the Department failed to dis-*

close any indebtedness on the part of Boggs, and that at the time the two payments were made to Boggs they were entirely correct and in accordance with the terms of the contract, but since that time the contractor had totally failed to accomplish the work. (Tr. p. 328.)

During the year 1906 nothing was done by the Government in regard to the building, nor was any suit brought on the bond.

On January 22, 1907, more than a year after the confiscation of Boggs' property by the Government's officers and his ejection from the Reservation, a contract was executed between the Government and one James H. Owen for the construction of a building on the site of the former building. (Tr. p. 214.)

The price named in this contract was \$16,600.00. It contained provisions varying in many respects from those contained in the Boggs contract, and provided for work not included in that contract, and for a building differing in more than two hundred respects (Tr. pp. 270, 337) from that specified in the Boggs contract; and it was made at a time when the conditions of the market were different regarding labor and building supplies from those in 1905. (Tr. pp. 261, 262.) These differences will be fully adverted to in the argument, but attention may now be called to the findings of the trial Court in this respect:

The Court found (Tr. pp. 354, 355), that the two contracts and sets of plans and specifications "were different in many substantial respects," that the two buildings were "different in many substantial respects," that \$1200 of the contract price required to be paid and actually paid to the said James H. Owens under his contract applied to work wholly outside of the work provided for in the contract between the said Augustus W. Boggs and plaintiff; that \$500 of the aforesaid contract price required to be paid and actually paid to the said James H. Owen under his contract by plaintiff was for

work and materials in excess of what was embraced and included in the contract between the said Augustus W. Boggs and plaintiff; that the cost of labor and building supplies was different in 1907 from their costs in 1905, and that plaintiff waited from the 28th day of December, 1905, to the 22nd day of January, 1907, before entering into a new contract for the construction of said building, and that by reason of the lapse of time and the changes in prices in the meantime, *a comparison between the two contracts furnishes no basis for estimating the plaintiff's damages in this case.*"

The materials belonging to Boggs confiscated by the Government were turned over by the latter to Owen, the new contractor, and were used by him in his work. The Government charged him only \$1,162.98 for materials of the value, as found by the Court, of \$2,418.58, that is, less than one-half of their value. (Owen, Tr. p. 261; Findings, Tr. p. 351.) These materials had remained on the ground for more than a year before they were turned over to Owen at less than half price.

The building contracted for by Owen was finished by him during 1907, within the contract time.

No suit was brought on the bond of Boggs by the Government until March 12, 1908 (Tr. p. 24), when the present suit was instituted.

The trial Court held that the United States was entitled to recover the two payments made Boggs about June 10th, and July 21st, 1905, with interest from September 1, 1905, less a credit for the confiscated materials, and rendered judgment accordingly against defendant in error on the bond for the full penalty thereof. (Tr. pp. 356, 357.)

It is believed that the foregoing is a fair statement of the undisputed facts.

ARGUMENT.

I.

Improper payment by the United States to the contractor released the surety.

It will be seen from the foregoing statement of the case that if the certificates of Perkins and Smith, dated May 23rd and June 30th, 1905, are true, their testimony, so far as it relates to defective work, is false, and if their testimony is true their certificates are false. We will assume in the present discussion that their testimony is true; under the next heading we will assume that their certificates are true.

The building contract provided for payments to the contractor as follows:

“Eighty (80) per centum of the value of the work executed and actually in place to the satisfaction of the party of the first part at the expiration of each thirty (30) days during the progress of the work, the amount of each payment to be computed upon the actual amount of labor and materials expended during the said period of thirty (30) days for which partial payment is to be made (the said value to be ascertained by the party of the first part); and the balance thereof will be retained until the completion of the entire work, and the approval and acceptance of the same by the party of the first part, which amount shall be forfeited by the said party of the second part in the event of the non-fulfillment of this contract; it being expressly covenanted and agreed that said forfeiture shall not relieve the party of the second part from liability to the party of the first part for any and all damages sustained by reason of any breach of this contract.” (Tr. p. 68.)

In this provision the surety had a vital interest. It was of the highest consequence to it that no payments be made to the contractor before he was entitled to them. Payment

to the contractor otherwise than in strict accordance with the contract would be a breach of the contract on the part of the insured, a surrender by the latter of a security required to be preserved for the surety's benefit, and a waiver of an incentive reserved against the contractor, of which the effect would be to discharge the bond. And if this security, operating as well for the benefit of the surety as for the benefit of the insured, was safeguarded by appropriate provisions in the contract, the surety was entitled to a strict performance of those provisions and of the duties either expressed or implied therein, on the part of the insured. A disregard of those duties, or a negligent or insufficient performance, would discharge the bond. And it is wholly unimportant whether the surety would by such acts or omissions be injured or prejudiced; such breach of the contract, such surrender of a security, such negligence, might on investigation prove to be for the actual advantage of the surety (the result being, however, otherwise in the present case); the surety still would have the right to stand on the letter of his bond and to decline liability differing in any respect whatever from that agreed on.

The security reserved by the provisions for payment to the contractor was elaborately safeguarded by the contract. Large responsibilities were imposed upon the Commissioner and his representative in that regard. The value of the actual amount of labor and materials expended during each thirty days, as a basis for payment, was to be ascertained by the Commissioner. (Tr. p. 68.) All materials and work were to be subject to the inspection of the Commissioner or of other persons appointed by him, with the right to accept or reject any part thereof. (Tr. pp. 67, 75.) The work was to be executed under the direction and to the entire satisfaction of the Commissioner or his representative, and in conformity with his instructions, and he or his representative was to be the final interpreter of the plans and specifications.

(Tr. p. 70.) The Commissioner or his representative had the right to discharge workmen, and to have access at all times to the work, which was to be entirely under his control. (Tr. p. 72.) The consent of the Commissioner or his representative was required even in such a detail as the use of stoves during plastering. (Tr. p. 72.) In case of specifications in general terms, he or his representative was to decide on the best and most suitable article to use. (Tr. p. 73.) Detail drawings were to be furnished of such parts of the work as he or his representative might desire to explain more fully, and without them the contractor might be required by him or his representative to tear down the work. (Tr. p. 73.) The contractor was to work in such order and at such places as might be required by the Commissioner or his representative. (Tr. p. 74.) Materials were required to be of the best quality and labor was to be performed in the most thorough, prompt and workmanlike manner, "to the full satisfaction of the Commissioner of Indian Affairs or his representative." (Tr. p. 73.)

Thus the bondsman was assured that the United States Government would maintain a representative on the ground, that the whole work during its entire progress would be under the personal control and supervision of a representative of the government, that the contractor would be held at all times strictly to account for faithful work, that the Government would keep in close personal touch with the work at all times, and that no payments would be made to the contractor unless, after careful inspection by the Government, his work justified them. The Government itself had a heavy interest in seeing that these assurances were realized, and it was most reasonable to suppose that it would carefully preserve them unimpaired at all times for its own sake, if not for the sake of the surety. And the law imposed upon it the duty of performing, without negligence, what it undertook to do.

The evidence, in which there is no conflict, shows that it negligently, and with an utter disregard of its own interests which would have been strange enough on the part of an ordinary business man, to say nothing of a great nation with power to employ the ablest service, paid to the contractor \$7,895.00, for which on its own contention it received nothing, and gave away for nothing all those protections which it had so elaborately reserved for itself and so solemnly guaranteed to the surety by its contract.

The judgment of the trial Court in this case was founded on that very fact. It is based on the theory that the contractor was not entitled to receive a penny from the Government, of the two payments which were actually made him. This being true, the decision of the trial Court contains its own refutation, and defeats itself. If the payments were wrongly made, the surety was discharged. And yet on no other theory is it possible to invent a justification for the judgment at all. If the payments were rightly made, obviously they could not be recovered.

Who was the representative of the Government on the ground, entrusted with the direction and control of the work, charged with the duty of explaining the details to the contractor, required when necessary to show the contractor where to work and in what order, and endowed with the full right to accept or reject any part of the work?

This official was James S. Perkins, a man who by his own declaration was an absolutely unfit and improper person to occupy a position of so much importance both to the Government and to the surety.

This person testifies as follows (Tr. pp. 135-138):

"I am a physician. * * * I have never been in the building business. I never had any experience of that kind at all. * * * I don't pretend to be an expert on these matters of construction—not at all—no, sir.

"Q. In fact, don't you remember, Doctor, having a talk with Mr. Hopper who was there representing Mr. Boggs, about the 21st of October, 1905, in which you told him that the Department ought to have sent a man there to superintend the construction as you were not competent to do it,—you didn't know how to judge what was right?

"Ans. I don't remember telling Mr. Hopper that, but that was the way I felt at any rate.

"Q. Yes, you would say that now?

"Ans. I would, yes, sir.

"Q. Do you remember having a conversation in November with him to the same effect?

"Ans. With Mr. Hopper? No, sir; I don't remember having a conversation with him, but I am quite sure that I made such remarks.

"Q. You subscribe to those sentiments now, do you?

"Ans. Yes, sir.

"Q. I understood you to say that the first time your attention was called to these alleged defects was a few days prior to the 21st day of July, by Mr. Carroll. Is that right?

"Ans. Yes, sir.

"Q. You hadn't examined the building prior to that time?

"Ans. Well, I had examined it as far as I was competent to examine it. I had been in it a good deal. As I told Mr. Hopper or whoever it was I did tell I was not competent to make a critical examination of it.

"Q. You were there in the employ of the Government for that purpose, though, were you not?

"Ans. Well, I was the superintendent of the school. The Department looked to me to report on the building.

"Q. Wasn't it one of your duties, as I understood you to testify, to keep track of the progress of the work and to report to the Government?

"Ans. Yes. I considered that my duty.

"Q. And that you did, did you not?

"Ans. Yes, sir.

"Q. But you didn't believe yourself competent to do so?

"Ans. I didn't. No, sir. I didn't think I was competent.

"Q. You were there every day on the work, weren't you, from the time it began?

"Ans. Yes, practically every day.

"Q. Isn't it a fact that almost all of the information you have given us came to you from Mr. Carroll?

"Ans. The technical information in regard to the building?

"Q. Yes.

"Ans. Yes, sir; that is true.

"Q. That is a fact?

"Ans. Yes, sir."

Dr. Perkins further says (Tr. p. 159):

"I was not myself qualified in any way to undertake the work that Mr. Carroll" (a carpenter) "did at the school. * * * I am not a building expert in any sense of the word."

This representative of the Government, charged with personal control and supervision of the work, with the duty of explaining the details to the contractor, of directing him where to work and in what places, of deciding on the kinds of materials to be used, of accepting or rejecting any part of the work, confesses himself unable to explain the meaning of the plans, even under the prompting of the district attorney, to whom their meaning was obvious. The latter shows him the plans and says to him (Tr. p. 163):

"I call your attention to that line that is drawn through there, and ask you what that indicates, if you know, *although it is not marked a purlin?*

"Ans. I think you had better refer that to the technical expert.

"Q. Well, don't you know as a matter of fact that that indicates a purlin at the bottom, and specifically detailed upon this other blue-print as a part of the same exhibit and marked just above the wall-plate?

"Ans. No, sir; I couldn't say that I know.

"Q. I see?

"Ans. I am not a techinal expert."

At the same time he said, having previously testified about two purlins (Tr. p. 164):

"When I testified yesterday that those plans such as were shown me called for two purlins, I was not sure of that particular matter, and testified accordingly. I would prefer for an expert to testify to that."

What words would be fitting to describe the capacity of a Government officer in full control of an important piece of construction, who is unable to explain a mark upon the plans, the meaning of which is obvious even to the unpracticed eye of a lawyer?

In fact, the district attorney himself gives him up, and tells the Court (Tr. p. 140), "He does not claim to be an expert."

This is the kind of man to whose judgment the Government of the United States, able as it was, with its unlimited resources, to engage the best service in the world, submitted the decision on the quality of the work and the right of the contractor to receive his pay. Was not the mere employment of a man so totally unfit an act of the grossest negligence?

How did he discharge the duty thus imposed on him? The consequent loss to the Government is a sufficient answer. For without his negligence that loss would never have occurred. If he had performed his duty with the ordinary care, intelligence and watchfulness of the most untutored mind, the glaring and obvious defects in the work would never have been passed and the contractor would never have received for them the money now sought to be recovered from the surety. The fault was his; and the Government has to thank its own servant, and itself in employing such a servant, for all the trouble. For this fault, the surety should not be required to shoulder the responsibility.

If *any part* of this money was paid the contractor before it was due, or if *any part* of the money paid never became due at all, the surety was discharged. As a matter of fact, none of the money was due at the time of payment, nor, under the theory of plaintiff in error and the trial Court, ever did become due at all. *All* of the work now claimed to be defective was in place at the time the payments were made.

The particulars in which the work failed to comply with the plans and specifications are very numerous. Lists of these may be found at pages 106 to 118 of the transcript. Perkins states, after the completion, that only three parts of the whole work had been properly done, to wit, the painting, the plumbing and the shingles, and that "all the rest is a public disgrace." (Tr. p. 157.)

The ceiling of the front building was built by the contractor three inches lower than required by the plans and specifications, and the ceiling of the rear building fifteen inches lower.—Only one purlin was provided in the roof, instead of two, and it was built in the wrong place and of defective size. On account of the wrong placing of the purlin, the principal rafter had bent at least an inch. Instead of notching the rafters over the purlins, a majority of the rafters were placed above the purlins and blocked up, many as much as two inches. Notching the purlin over the principal rafters was omitted.—The roof of the rear building was not trussed, was not supported from the partitions, and no ties were used to prevent it from spreading.—The outside walls were pushed out at the top from three inches to sixteen inches. The top stones on the walls were becoming tipped, the pressure not being straight downward.—The wall-plates were of defective sizes throughout, varying as much as six inches on the front building from those specified.—Anchor bolts were wholly omitted, though the specifications called for them every eight feet, at all angles and splices, and for one on each side of every chimney.—The partition walls were

not bonded with the rest of the building.—Only one flue was constructed, instead of two, in the chimneys between the dining rooms. This flue was 6 in. x 2 in., instead of 9 in. square, as specified. The stones of these chimneys were not bonded into the partition wall.—The chimney at the south end of the dining room was built in the same way, without being bonded. It enlarged about four inches all around where it came out of the roof, it lacked at least four feet of going to the highest point of the roof, and it was not stayed with an iron rod, as required.—The chimney between the two kitchens was built as a one-flue chimney, 8 in. x 28 in., instead of three, 9 in. x 9 in. each.—The flues in the chimney between laundry and ironing room were built 8 in. x 10 in. each, instead of 9 in. x 12 in. each, as required, and the chimney was reduced to half size before reaching the roof.—Other chimneys outside the roof were built of stone not specified, the mortar of all was defective, and could be easily removed by shoving through a carpenter's rule.—None of the chimneys were plastered on the outside, opposite timbers, as required, and the framework was against all the chimneys, making them dangerous.—The plaster used was very poor, consisting of quicksand and water, with very little lime.—The plaster was stopped at the wainscoting, instead of going to the floor, whereby about one-third of the plastering was omitted.—For wainscoting of clear pine, sandpapered and made perfectly smooth, the contractor substituted wainscoting of Douglas fir, not clear nor sandpapered nor made smooth.—For the neat, moulded capping for wainscoting detailed and specified, the contractor substituted a beveled strip which could be pulled off with the fingers.—The nailing strips were not as called for.—No box frames were put in windows, crevices existed from one to four inches in size, in some instances so wide as not to be covered by the window casing, and window stools were made of $1\frac{1}{8}$ in. material, instead of $1\frac{3}{8}$ in., and not moulded, as specified. The door

frames were subject to the same objections as the window frames. To cover cracks at frames, strips were nailed on outside. Eight outside door frames had a space above frames one to five inches in width, covered with an unsightly board of common pine. No wooden bricks were used, as specified, but all frames were secured by nails driven into the stone wall. The doors were specified to be three feet wide; the contractor substituted doors two feet ten inches wide. Instead of door sills of 4 in. hard pine or oak, beveled, the contractor built them of 2 in. soft pine, not beveled.—For windows of 10 in. x 12 in. hammered glass, $\frac{1}{2}$ in. thick, the contractor substituted common window glass, 10 in. x 16 in. single thickness.—Joists in bakery and ironing room were 16 in. o. c., instead of 12 in. o. c.—Stoop floors were of $\frac{7}{8}$ in. pine, not quarter-sawed, instead of $1\frac{1}{8}$ in. quarter-sawed. The treads of steps were of $1\frac{1}{8}$ in. and $1\frac{1}{4}$ in. soft pine, instead of $1\frac{3}{8}$ in. clear hard pine.—The flooring used was of mill-run Oregon pine, not clear nor quarter-sawed, with many bastard boards, instead of clear quarter-sawed matched yellow pine.—Floor joists in corridor were set on timbers blocked up from the ground, instead of on the walls.—Instead of 9 ceiling ventilators 2 ft. square, the contractor put in 12, each 10 x 12 in.—Ceilings were made of $\frac{3}{4}$ in. to $\frac{1}{2}$ in. Oregon fir, common lumber, and not clear, instead of $\frac{5}{8}$ in. clear, matched, beveled pine.—The frieze specified on gables was left off at the base in each case, the shingles on the gables were not of uniform width, as required, and the ventilators in the gables were improperly built.—The hearth borders were poorly constructed.—The hearths were poorly built, trimmer arches as specified being totally omitted, and pine boards substituted, soft brick instead of selected red brick used, and covered with a poor quality of cement in a thin layer.—The window weights used were too light, the sash not mortised but bradded, and all glass single strength.—The ice box was of poor workmanship.—The cornice was

made of unfit material, the frieze and fascia of common lumber with plenty of loose knots. The frieze stood away from the walls $\frac{1}{2}$ in. to $1\frac{1}{2}$ in. The batten doors were made in a shiftless manner.—Bridging was omitted entirely in three rooms, in other places 1 in. x 2 in. stuff was substituted for $1\frac{1}{2}$ in. x 3 in. as specified, and the bridging was not fitted to the joists, was badly split, and was a poor job. (Tr. pp. 111-118.)

Could a building contract be violated more flagrantly, more openly, more boldly, than this one was violated from the very beginning of the work, and in every part of the construction? Only three parts of the work, the painting, the plumbing and the shingles, were proper, and these were the very last parts of the work, installed mainly after the contractor had been paid for those parts which were all wrong. For the portion which was good, he was not paid; for the portion which was bad, he was paid.

John Charles, the inspector who finally rejected the building, points out the defects which were the most substantial; and every one of them, as we will show, was in place in the building when the payments were made to Boggs. He says (Tr. p. 191) that the most substantial of the discrepancies were "the manner in which the roof was constructed and the height of the walls," to which he adds (Tr. p. 195), "the failure to bond the walls," and (Tr. p. 196) "the entire stone construction down to the window-sill line."

In fact, the whole building was a mass of errors from top to bottom. He well sums up the situation as follows (Tr. p. 195):

"In my opinion, the building as I found it could not be made to comply and conform with the plans and specifications without being torn down."

There is thus no question of the government's officers having been deceived, in spite of the exercise of reasonable care, by a specious appearance of faithful work, concealing latent

defects impossible of discovery except on a laborious scientific inspection. The defects in this work pervaded it from the top to the bottom and from the beginning to the end. They shouted from every part of the building, inside and out. They involved such matters as the outside stone construction, which the most casual observer might have condemned if he had had the plans and specifications, as Perkins had, and the height of the walls and construction of the roof, which were visible to anyone who did not positively close his eyes. Were these things, in fact, obvious to anyone who chose to look? Mr. Charles himself frankly states that they were (Tr. pp. 190-1):

"Q. Mr. Charles, what in your opinion was the most substantial of these discrepancies?

"Ans. I think the manner in which the roof was constructed and the height of the walls.

"Q. Was that a matter easily discernible by anybody during construction?

"Ans. Not necessarily, unless they were directly competent to understand the intention of the details of construction.

"Q. I am assuming that a person was competent to understand something about construction. If you had been there and seen the roof being constructed, you would not have approved it, would you?

"Ans. No, sir; I would not have accepted it.

"Q. It would not have satisfied you?

"Ans. No, sir.

"Q. And the same applies to the height of the building?

"Ans. Yes, sir.

"Q. And the plastering?

"Ans. Yes, sir.

"Q. And the chimneys?

"Ans. Yes, sir.

"Q. And the woodwork?

"Ans. Yes, sir.

"Q. None of that would have been approved by you if you had seen it while it was being constructed?

"Ans. No, sir."

As to the cement, he says (Tr. p. 192):

"I would not have had that if I had been there at the time."

He further testifies (Tr. p. 194):

"I personally inspected the ceiling joist and the purlins and the rafters. I went into the attic by a ladder. The attic was accessible by ladder. *It could easily have been viewed at any time.* I got there myself a number of times. *Dr. Perkins went there with me. Dr. Perkins went up and looked at these things himself. As far as I could tell from the construction there was nothing to hinder his having examined them.*"

Perkins himself testifies (Tr. p. 139) that "a purlin is visible after the building is completed, but not without going up into the attic."

He went up into the attic with Mr. Charles—when it was too late. Why had he not done so before, or at least opened his eyes while the work was being done?

Kincaid, another Government witness, and Boggs' workman, testifies as follows (Tr. p. 185):

"Some of this material which I found there, and which I considered to be insufficient, might have been used in the month of June in joists and truss work and rafter work and some used later. It was lying in a pile like any builder has their lumber stacked up. Anybody familiar with lumber could tell by looking at that lumber that it was not up to the plans and specifications, if they were familiar with it—looking it over they could tell there was a difference."

Commenting on the stone construction, as to which "there wasn't a stone that was properly fitted to the frame," Mr. Charles testifies as follows (Tr. p. 196):

"Q. Was the error a glaring and apparent one?

"Ans. Very.

"Q. You could tell it at a glance, could you?

"Ans. Yes, sir.

"Q. How much of the building did that cover?

"Ans. The entire building.

"Q. You found it was that way all over the building?

"Ans. Yes, sir.

"Q. Nothing to prevent you from seeing that or from anybody seeing it?

"Ans. I saw it.

"Q. The error of the bonding of the walls was also apparent, was it not, while the construction of the stone work was going on?

"Ans. It would be to me; yes, sir.

"Q. Or anybody that had the plans and specifications in his hands?

"Ans. Yes, if they understood what the specifications required or the general method of doing work."

Mr. Mulford testifies (Tr. p. 295) as follows:

"All that time the various parts of the work as it progressed was in plain sight to anyone coming about the building. There was no part of the construction that was concealed from sight while it was being constructed."

He further testifies (Tr. pp. 301-2) as follows:

"Q. These discrepancies that you have been speaking of just now, were they apparent to the eye or not?

"Ans. Oh, yes; yes, sir.

"Q. The fact that the wall was not the same height all around could be seen by anybody?

"Ans. Yes, sir.

"Q. Do you know whether Dr. Perkins had a copy of the plans and specifications there?

"Ans. Yes, sir; he did.

"Q. You have seen him examining them, have you?

"Ans. Yes, sir.

"Q. During the month of June?

"Ans. Yes, sir."

There was one government employee at the Indian school who was evidently thoroughly competent to do the work which Perkins was unfitted to do; but *he* was not selected for that purpose. The Government chose to employ a grossly incompetent person, and declined to avail itself of the services of a man perfectly fitted to perform them, who was on the ground at the time, and already in the Government's employ. This was William R. Carroll, the school carpenter. What knowledge Perkins got of the character of the work and materials, he received not through his own senses, but from the voluntary declarations of Carroll. (Tr. pp. 99, 134, 138, 148, 149, 161, 167, 169.) The latter evidently saw the hopeless stupidity of the Government's representative, and decided to make him open his eyes, if possible. *But he spoke too late.* Perkins says of him (Tr. p. 149):

"I think he was there all the time this work was going on. He was on the ground. I don't know whether he went around and examined the building or not. *I didn't tell him to.* He was there on the ground—he *couldn't help seeing*—whether he gave it a careful, critical examination I don't know. Up to about the 21st of July Mr. Carroll said nothing to me about any defects in the building. At that time he just came to me and told me about it. He said it wasn't being erected as it should be,—there was mighty poor work being done on it, and I asked him to point out the defects to me and he did so. That was after the roof was on, the floors down, the fireplaces and chimneys up, and the plastering on, and about \$9,968 worth of work in place. Yes, sir. That was after the vouchers were issued. Before the building reached that stage he hadn't mentioned the matter to me."

Perkins further testifies (Tr. pp. 161-2):

"It is true Mr. Carroll called my attention to certain so-called defects *not to exceed a week prior to the 21st day of July, 1905.* Prior to that time Mr. Carroll had said nothing to me about any so-called defects in that

work. Mr. Carroll was the school carpenter. Prior to the time that he came to me with a list of so-called defects *I had never asked him to give his attention to the matter of the building that was being built by Mr. Boggs.* When he came to me he came with a complaint—I couldn't say whether it was a list of defects or not. He came to me and talked to me about the different items. It was *then* that I asked him to assist me in learning just exactly the status of the work.

"Q. Prior to that time you did not know the exact status?

"Ans. No, sir.

"Q. Of the work upon which you had been reporting to Washington?

"Ans. No, sir.

"Q. That is from a technical standpoint?

"Ans. Technical standpoint? I was ignorant of some of the facts in the case.

"I read the contract, *part of it*, read *at* the specifications as soon as I received them, I suppose, but at that time I had no familiarity with them. I gave my attention *first* specifically to acquiring a familiarity with the plans and specifications *after* Mr. Carroll came to me and talked to me about it, the way the work was going on. *I gave my serious attention to it as soon as the matter was first called to my attention that there were being violations of the contract.* Prior to that time I had *assumed* that the contract was being executed in good faith, and did not know anything to the contrary."

Why did Carroll, a Government employee, stand quietly by without a word until the defective work had all been installed? He knew that Perkins was seeing nothing, otherwise he never would have spoken at all. Why did he permit Perkins and Smith to certify that the work was perfect, when he knew it was all wrong?

Why did not the Government employ, as its representative, in control of the work, a man who was competent and

who was already on the ground, perfectly available for that service? Can any excuse be invented for employing Perkins, when Carroll was available?

Why did not Perkins, who was at all times aware of his own incompetence, and thought at all times that the Government should have employed someone else, engage the assistance of Carroll, the one competent man on the ground? "I don't know whether he went around and examined the building or not. *I didn't tell him to.*" Why didn't he tell him to? He knew he was himself unfit to do it, and he knew that Carroll was fit; the first thing he should have done was to have obtained Carroll's help. But he did not.

Carroll "was there on the ground—he *couldn't help seeing.*" If Carroll couldn't help seeing, why should not Perkins have seen? No technical knowledge was required to any degree, but simply a reference to the plans and specifications and to the work as it progressed. The discrepancies were so glaring that Perkins' neglect to see them amounts to a fraud on the surety and on the Government, and at the least is gross and wanton carelessness.

Why did not Perkins, the man in control of the work for the Government, owing heavy duties to his employer and to the surety, give his "*serious attention to it*" at once, instead of waiting until after the harm had been done? What shall be said of a Government official who does not regard his duty as of sufficient importance to give his "*serious attention to it*"? What shall be said of a Government official who has to be waked up to a sense of his duty by the gratuitous protest of a subordinate? What excuse can be urged for his *assuming* that the work was all right when it was his office to examine it carefully as it progressed, and report on it in detail to his superiors? What negligence could be more gross and wanton than that of an investigating officer who "did not know the status of the work on which he had been reporting to Washington?"

It has already been said that the work now claimed to have been defective was in place at the time the Government made the two payments to the contractor. This is very clearly shown by the evidence. Perkins testifies to it himself, as we have just seen (Tr. p. 149):

"That was after the roof was on, the floors down, the fireplaces and chimneys up, and the plastering on, and about \$9,968 worth of work in place. Yes, sir. That was after the vouchers were issued."

Mulford testified (Tr. p. 294) that by the 30th of June, 1905 (the date of the voucher for the second payment), the walls were entirely finished, the outside walls and all stone walls in the building inside and out; that the roof had been entirely constructed and sheeted, and 31,000 shingles laid on it; that the ceiling and floor joists were all in except a few in the laundry which he had been asked to leave out; that 800 yards of plastering had been done, and nearly all of the roughing in of the plumbing had been done; that there were about 150 yards of plastering yet to white-coat, but the rough plaster was all on; that some window frames were in and some floor had been laid; that the grounds for all of the wainscoting were in; that (Tr. p. 295) the gasketing was all done; that they had started to put the ceiling on; that the roof was all done except about one-third of the shingling (N. B.—the shingling is admitted to be satisfactory); that the paper was all on the roof; that the rafters and purlins were all in; that the wall-plates were in; and that some work had been done on the ice box.

When Rolland went to the ground on July 14th, 1905, the building was up, the walls were up, the plastering was all on except the white-coating, the shingles were about three-fourths on, the chimneys were in, and the inside finish remained to be done. (Tr. p. 311.)

When Hopper went to the ground about July 10, 1905, the building was all up as to the stone work, the floors were all laid except a little, the plastering was all completed except a little white-coating, the shingles were pretty much all on, and the inside work had progressed some little. The sash remained to be fitted, probably the doors to hang, some casings to put on, some of the wainscot to put on, some of the ceiling to put on, and some work around the ice box to be done. Otherwise the building was finished. No structural work was done after that time. (Tr. p. 303.)

In short, when Perkins and Smith made their certificates on June 30, the building was structurally completed, and only the finishing remained to be done. They certified at that time that work of the value of \$9,869.25 had been installed, which is slightly more, on the basis of the contract price, than 77½% of the whole work. They had permitted the building to proceed nearly to completion not only without objection, but actually with their written approval, solemnly made "on honor."

Nor had they even the paltry excuse of lack of opportunity. They resided only 150 yards from the place of construction (Perkins, Tr. p. 138), and were in and about the building every day. (Perkins, Tr. pp. 138-140; Kincaid, Tr. p. 181; Hopper, Tr. pp. 303-4; Mulford, Tr. pp. 295-297; Rolland, Tr. p. 313; Smith, Tr. pp. 202, 205.) The errors pervaded the whole construction and were glaring and apparent to the most casual inspection. How immediately evident should they have been to those two Government officers, who inspected the work every day for the very purpose of finding errors!

For the purpose of making the voucher of June 30, Perkins and Smith on behalf of the Government and Mulford on behalf of the contractor made an inspection together of the whole work. Speaking of Smith, Mulford says (Tr. p. 297):

"He examined the stone work with Dr. Perkins and myself. They made a general inspection of the whole work, and it was on that inspection that the certificate involved here of June 30th, 1905, was made."

Even that general inspection of the whole work, made for the specific purpose of determining whether any part of the work failed to conform to the specifications, failed to reveal to these two men any inkling of the fact, *afterwards* made so much of by Perkins, that the whole building was a glaring fraud.

"It was as soon as the work commenced," said Smith (Tr. p. 202), "that Dr. Perkins first asked me to look over the building." Although he did examine the building every day (p. 202), "that Dr. Perkins first asked me to look over the whole work for the purpose of issuing his certificate on it (Tr. p. 297), and did certify on honor that the work was all right, he has the temerity to testify that the work was in fact defective. His cool self-stultification is sufficiently amazing. If his certificate was true, his testimony was false; and if his testimony was true, his certificate was false. But a little matter of that kind bothered him not at all, any more than it did the ineffable Perkins.

In order to render more palpable the unscrupulous faithlessness of the Government's officers which vitiated this whole transaction, we shall direct the Court's attention to the following portion of Mr. Smith's cross-examination (Tr. pp. 204-209):

"Q. Now, did you examine the building prior to the 30th of June, 1905?

"Ans. Yes, sir.

"Q. I show you defendant's Exhibits 1 and 2 for identification. That is your signature on each of those?

"Ans. That is my signature.

"Q. That is your signature?

"Ans. Yes, sir.

"Q. Designated 'inspector' on the second one and 'engineer' on the first one?

"Ans. Yes, sir.

"Q. Were the facts certified by you in those papers true?

"Ans. What do you mean by 'the facts of those papers'?

"Q. Well, just look at them and tell us whether all of the statements therein contained were true or if any of them were untrue, let us know that?

"Ans. I don't recall the stipulations of the contract.

"Q. Have you looked at both of those papers or only one? Look at both of them and tell us whether there are any statements contained in these papers which are not true.

"Ans. This one of May 23d I don't think the material was in the building as specified—that is here, as it would say.

"Q. You think that that statement is incorrect, then, do you?

"Ans. Well, the material was on the ground.

"Q. The material was on the ground?

"Ans. Yes. And it was my understanding—

"Q. Do you mean 61,800 and—

"Mr. Horton: Well, the witness was about to answer.

"Court: Yes, go ahead.

"Ans. Whether that was already in the building or not I would not say at that time.

"Q. (By Mr. Bowen): You say in each of these certificates 'I certify on honor that I have carefully inspected for the Indian service the work prescribed in the foregoing.' That is true?

"Ans. Yes, sir.

"Q. You were there every day?

"Ans. Yes, sir. I was around the building some time during the day.

"Q. Every day?

"Ans. Yes, sir.

"Q. And it was part of your duty under Dr. Perkins to inspect that building from day to day, wasn't it?

"Ans. Not exactly.

"Q. Well, you did examine the building—you did every day under Dr. Perkins for the purpose of being able to make a report, didn't you?

"Ans. I looked over the building.

"Q. For the purpose of being able to sign these certificates?

"Ans. *That is a matter of form* that was furnished by the Indian Department.

"Q. Well, just answer the question. You made your examination from day to day so that you would have the information on which you would be able to sign those certificates?

"Ans. I signed those certificates.

"Q. Now, that does not answer my question?

"The Court: Repeat the question.

"(Last question read by the reporter.)

"Ans. *Yes, sir.*

"Q. (By Mr. Bowen): And you continued that investigation from day to day up to the 30th of June, when you signed the second one, didn't you?

"Ans. *Yes, sir.*

"Q. All of that was under the direction of Dr. Perkins?

"Ans. *Yes, sir.*

"Q. And Dr. Perkins was your superintendent in charge of the construction under whom you acted? That is correct?

"Ans. *Yes, sir.*

"Q. Now, you say in both of these certificates 'I find it,' referring to the work that you inspected, 'to be actually in place and of the value represented; that it has been done in a workmanlike manner, and that the conditions of the contract have so far been fully complied with.' Were those statements true? Had the work been done in a workmanlike manner?

"Ans. Well, *that is not all true.*

"Q. *That is not true?*

"Ans. *No, sir.*

"Q. The work hadn't been done in a workmanlike manner?

"Ans. I could not recall that.

"Q. But you knew that there was some that hadn't been?

"Ans. I don't quite understand that document as it is there.

"Q. Well, you have just read them, haven't you?

"Ans. *I didn't know that it was necessary to be in the building.* That is, I know that it reads that way, but was it necessary to be in the building?

"Q. You understood this thing, didn't you, 'that the work had been done in a workmanlike manner'?

"Ans. Well, *it might be piled up on the ground in a workmanlike manner.*

"Q. Was there any work actually in place in the building at that time which was not done in a workmanlike manner?

"Ans. *Well, I couldn't say.*

"Q. You couldn't say? Then you don't know whether this certificate was true or not?

"Ans. I don't recall the work now. I can't see it as I did then.

* * * * *

"Q. You certify that the stipulations of the contract have so far been fully complied with. Was that statement true or not?

"Ans. I don't remember now.

"Q. You don't remember now? Then you are not in a position at this time to confirm the statements which you made in those certificates? Is that right?

"Ans. That has been five years ago.

"Q. You cannot confirm these statements now?

"Ans. *Not exactly; no.*

"Q. So far as you know, the statements might be untrue?

"Ans. I can't see the building as it stood then.

"Q. Have you sufficient confidence in these certificates themselves to say that those statements must have been true or otherwise?

"Ans. They were true in a way, but *I could not say that they were all true.*

"Q. *You could not say that they were all true?*

"Ans. *No.*

"Q. *Some of them might have been untrue?*

"Ans. *As far as I remember now.*

"Q. You were aware, in signing these papers, that the Government would make the payments to Mr. Boggs on the faith of these certificates, weren't you?

"Ans. *Yes, sir.*"

If, when Perkins authorized the payments to the contractor, he did not know that the building was, as he afterwards strenuously proclaimed, a monument of fraud, such ignorance was possible only by reason of his own total incompetence and his own utter disregard of the duties imposed upon him by his superiors and by the building contract. If, when he authorized those payments, or either of them, he did in fact know that the work which he certified on honor to have been faithfully performed had been performed in a faithless manner, his misconduct was all the more gross, and the Government's duty to the surety was all the more clearly violated. And it appears that Perkins did in fact know, at the time when he authorized the second payment to Boggs, that Boggs was not entitled to it.

Perkins at first testified, as we have seen, that he was first informed by Carroll of the defects "not to exceed a week prior to the 21st day of July, 1905." (Tr. p. 162.) He had previously stated, as already mentioned, that Carroll had first informed him of the defects "about the 21st day of July." (Tr. p. 149.) He repeated that statement afterwards as follows (Tr. p. 167):

"A few days before the 21st of July. It might have been as much as a week before. It might have been a week or a little less. I can't remember exactly. As to whether it was probably less than a week before the 21st of July I would say along about that time."

He was then confronted (Tr. p. 168) with his letter to Boggs dated *July 8th*, 1905, in which he complained about the purlins, the rafters, the ceilings, the wainscoting, the wall-plates, the anchor bolts, the stoop floors, the window sash, the chimneys, the platsering and the hearths! Of course he retracted what he had previously said, and moved the date of Carroll's advice to a date which might, by his own admission, have been *before the 30th of June!*

His testimony on this subject is as follows (Tr. pp. 169-172):

"Q. The defects mentioned in that letter had been discovered by you some time prior to July 8th?

"Ans. Yes, sir.

"Q. And do you know how long prior to that time?

"Ans. No, I can't fix the date. It was along that time somewhere.

"Q. Do you remember now the incident?

"Ans. I remember writing that letter.

"Q. Do you remember making an examination of the building which resulted in that letter?

"Ans. Yes, sir.

"Q. Was that your own motion or was it made at Mr. Carroll's suggestion?

"Ans. That was made at Mr. Carroll's suggestion. He called my attention to all those defects.

"Q. He had called your attention to all those defects prior to July 8th?

"Ans. That is probably the fact; yes, sir.

"Q. Are you able to say how long prior to that time?

"Ans. No, I would not like to say how long.

"Q. It may have been as early as the first of the month?

"Ans. Well, *it might have been earlier* or it might have been later.

"Q. In June, so far as your recollection now serves you?

"Ans. Well, I can't say. I don't remember, Mr. Bowen, just when he did call my attention to those.

"Q. You would not be prepared to say now that it was not in June, would you?

"Ans. I would not be willing to swear just when it was. I might be mistaken about the date.

"Q. When you said it was as late as a few days before the 21st you were mistaken in that?

"Ans. *Yes, sir; I evidently was.*

"Q. So far as your recollection serves you now it might have been prior to June 30th?

"Ans. *It might have been prior to that or it might have been after that.*

"Q. When did you communicate the substance of this letter, if you ever did, to the Department at Washington, Doctor?

"Ans. I looked up one letter with Mr. Horton; it was dated July 21st—I think that was the date of it, but I don't remember whether that was the first communication with the Department or not.

"Q. Do you remember whether you wrote the Government about the 8th of July in respect to the matter set forth in this letter?

"Ans. No, sir; I don't remember.

"Q. You don't know?

"Ans. I don't remember.

"Q. The only letter you have any knowledge of now is the letter dated July 21st?

"Ans. I refreshed my memory because Mr. Horton showed it to me.

* * * * *

"Q. You are not now aware that you advised the Department between the 30th of June and the 21st of July of any defect?

"Ans. *Not from memory—no, sir.*

"Q. Have you any documents in your possession that would enlighten us upon that subject?

"Ans. *No, sir; I haven't anything on that subject.*

"Mr. Horton: Referring to Defendants' Exhibit 8, being a letter dated July 8th, 1905, wherein you set forth a list of the discrepancies forwarded to A. W. Boggs, the defendant in this case, I will ask you to

state your first recollection as to whether or not it was before or after the 30th of June, 1905, that the discrepancies therein mentioned were called to your attention by Mr. Carroll?

"Ans. I don't remember, Mr. Horton. I would not like to swear to that."

By this witness's own admission it might have been *prior to June 30th* that he was advised of the defective work by Carroll! We are entitled to assume against the plaintiff that such was the case, when plaintiff's chief witness, taxed with the fact, does not deny it, but on the contrary admits that it might have been so. He was given a fair chance to repudiate the suggestion, and he declined to do so. This is fully equivalent to a positive admission that the fact was as charged. And if so, what shall be said of his certifying on honor that the work was perfect, and authorizing payment therefor? Could there have been a more palpable fraud perpetrated on the surety?

One thing is certain: he authorized payment for perfect work on June 30, and he knew the work was bad prior to July 8th. Those dates are so close together that it seems impossible that on June 30th he should have thought the work beyond criticism and almost instantly thereafter have perceived it to be all wrong.

What did he do on receiving this sudden illumination? It may be supposed that as he knew it would take some five days for the certificate of June 30th to reach Washington (that is on or about July 5th), and as he knew it would take some time thereafter, perhaps two weeks, say until July 21st (as in fact happened), before a warrant could be issued for the payment, and as he knew it would take some five days longer before Boggs could receive the warrant in California, and some five days longer before it could be honored in Washington, he would have wired the Department at once on dis-

covery of the defects, to stop payment, or would at least have written to that effect. He did nothing of the kind. No warrant for the payment was issued before July 21st. (Tr. p. 171.) Beyond question, he knew of the defects from Carroll by July 5th. The certificate of June 20th was opened at Washington on or about July 5. A telegram on that date would have arrived at the Department at about the same time as the certificate, and the payment would never have been made. Even if he had waited until July 8, when he wrote Boggs, he would have been in ample time. Why did he write *Boggs*? The person he should have addressed was the *Commissioner of Indian Affairs*. He should have stopped that payment at all hazards, instead of spending his time writing Boggs "for his information and future benefit." The Department did nothing towards making payment until July 21. He had a clear two weeks, at the very least, after Carroll told him of the defects, within which to stop the payment. A ten-word letter or telegram would have done it. He neither wrote nor telegraphed a single word.

At this point appears the immediate and direct negligence of the Department itself. Perkins did write, finally, on July 21 (Tr. p. 272), advising the Department of the defects. On the same day or shortly thereafter the warrant for payment was issued at Washington. (Tr. p. 171.) Perkins' letter was received accordingly about the time or before the time when Boggs received his warrant, and before it could possibly have been presented by him for payment. In spite of this actual knowledge at Washington of the defects in ample time, the United States Government *paid* the warrant when it was thereafter presented. Thus the defendant in error paid the contractor for work which was at the time known to be bad not only by its representative on the ground, but by the Commissioner of Indian Affairs at Washington himself. What did that official do when he learned how bad the work

was? He did *nothing* for some five days after learning it. Then what did he do? He merely wrote to Boggs (on July 31) mildly reproving him for the "substitutions evidenced in this building" and sent a copy of this letter to Perkins. (Tr. p. 272.) All the same, he permitted Boggs' warrant to be paid when it was presented.

To effect the surety's discharge in this case, it is enough that it appears that the contractor was paid for work which should not have satisfied any reasonable mind. This fact is established without the least conflict, and more than that is established.

The Government's chief representative in control of the work, entrusted with the duty of passing on its quality, for the purpose of payment, was grossly incompetent, as he himself admits.

He performed his duty with the grossest and most wanton negligence, and with the most utter disregard of the provisions of the contract; from which resulted the payments made by the United States Government to the contractor.

The Government's other representative, charged with the duty of passing on the quality of the work for the purpose of payment, performed his duty with the same negligence and the same disregard of the contract, and with the same result.

The Government was under no difficulty in obtaining competent service in this regard. The office required no expert knowledge to any high degree. It required only simple intelligence and ordinary care, and a reference from time to time to the contract, plans and specifications. Such knowledge as an ordinary carpenter would have was quite sufficient. An ordinary carpenter was at the very time present on the ground, under the Government's employ, and he showed himself to be a thoroughly competent inspector when his services availed nothing. But this man the Government did not appoint. It chose rather to appoint a physician, without knowl-

edge or training of any kind in building methods, who was fully aware of his own incompetence and was at all times convinced that the Government should have appointed someone else. Even if there had been no competent person available on the spot, the Government of the United States, with its unlimited resources, was under the duty of sending a competent man there. Los Angeles and other neighboring cities are full of carpenters seeking employment, any one of whom could have seen, as Carroll did, what was so glaring and apparent. If the Government had chosen to employ a carpenter instead of a physician, there would have been no loss in this case. And to have done so, it need not have stepped one foot beyond the Indian school itself.

Even Perkins, knowing his own unfitness as he did, declined to ask the help of the man directly at hand, already under his orders, who could have saved the situation for him. Not until Carroll, after all the harm had been done, voluntarily came forward with an implied protest against his superior's negligence, did Perkins ask his assistance.

But even then it was not too late to have refused payment to the contractor. Carroll made his protest to Perkin prior to July 8th, and no doubt before June 30th itself. Perkins does not deny, though charged with the fact, that he learned of the defects from Carroll prior to his issuing his certificate! If he did, further argument on this case seems unnecessary.

Giving his testimony the utmost latitude possible, still he had learned of these defects prior to July 8th. No warrant for payment was issued at Washington before July 21st. In the meantime he did nothing. He did not communicate his discovery to Washington, nor retract in any way his statement that the work was all right. He permitted the payment to be made *after* he had learned that Boggs was not entitled to it. The authorities at Washington did the same thing. Within five days of July 21 they knew of the defective con-

struction, and yet they permitted Boggs to be paid when the warrant *afterwards* came in for payment. The payment was therefore made with full knowledge of the defective work on the part of the Government's representative on the ground and on the part of the Government's officers at Washington.

Under these circumstances the bond was discharged. If ever an equitable case existed for the enforcement of the rule now invoked, this is such a case. The attempt made here is to force the surety to pay back the identical sums given away voluntarily and with perfect indifference by the Government. The law will not thus thrust upon the surety the burden of the Government's own default. The bond does not guarantee wholesale the efficiency of the public service in the Department of Indian Affairs. The Courts will not permit the Government to throw away its money and recover it back from a stranger to its act. No such premium is placed by law upon the inefficiency and dishonesty of the Government's servants.

The leading case on this subject is *Calvert vs. London Dock Co.*, 2 Keene Ch. 639, and we will first quote the statement of the principle made by Lord Langdale in that case. That decision stands as the law of the State of California, having been expressly approved in *County of Glenn vs. Jones*, 146 Cal. 518.

The Court there said (p. 522):

"The leading case, which has since been followed by the Courts almost without exception, is *Calvert vs. London Dock Co.*, 2 Keene Ch. 639. There the contractor undertook to perform certain work, and it was agreed that three-fourths of the work, as finished, should be paid for every two months, and the remaining one-fourth upon the completion of the whole work. It was held that the sureties were released by reason of payments exceeding three-fourths of the work done, having, without the consent of the sureties, been made to the contractor before the completion of the whole work. The

opinion was delivered by Lord Langdale, the master of the rolls, in which he said: 'What the company did was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure which by the contract was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands one-fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances, I think that their situation with respect to Streather was so far altered that the sureties must be considered to be discharged from their suretyship.' "

We refer the Court to the following cases:

Fidelity & Dep. Co. vs. Agnew (C. C. A. N. J.),
152 Fed. 955;

Shelton vs. American Surety Co. (C. C. A., Pa.),
131 Fed. 210;

Shelton vs. American Surety Co. (Ct. Ct., Pa.),
127 Fed. 736;

National Surety Co. vs. Long (C. C. A., Ark.),
125 Fed. 887;

Commissioners vs. Branham (Ct. Ct., Ind.), 57
Fed. 179;

County of Glenn vs. Jones, 146 Cal. 518;

Kiessig vs. Allspaugh, 91 Cal. 231;

Bragg vs. Shain, 49 Cal. 131;

Queal vs. Stradley (Ia.), 90 N. W. 588;

Electric Appliance Co. vs. U. S. F. & G. Co.
(Wis.), 85 N. W. 648;

Backus vs. Archer (Mich.), 67 N. W. 912;

St. Mary's College vs. Meagher (Ky.), 11 S. W.
618;

First Nat. Bk. vs. Fidelity & Dep. Co. (Ala.), 40
So. 415;

Gato vs. Warrington (Fla.), 19 So. 883.

In *Fidelity & Deposit Co. vs. Agnew*, 152 Fed. 955, the Circuit Court of Appeals said:

"The provision in a building or working contract, that the contractor or builder shall be paid as the work progresses, according to the amount of materials furnished or work performed, upon estimates to be made by the supervising architect or engineer, whether a percentage is to be retained therefrom until the whole is done or not, redounds to the benefit of the surety or guarantor of the party who is to fulfill the contract; and upon payment being made in disregard of it, there is such a *departure* from the contract upon which the undertaking of the surety or guarantor is based, that he is released. The purpose of such a stipulation is to guard against the consequences of a default in case the principal contract proves a losing one, or the contracting party for any reason fails to comply, the percentage retained, where that is provided for, affording additional security as well as holding out an incentive; and when it is not observed, and advance or over-payments are made, it is so obviously to the prejudice of the surety that it operates as a discharge as matter of law."

In the case cited 90% of the contract price was to be paid each month of the amount of estimates made by the architect in charge of the work, of the material on the ground delivered, during the preceding month. The Court said:

"The complaint of the surety is that, instead of adhering to the terms of the agreement, and paying upon estimates of the architect as the work went on, no estimates, or *at least none worthy of the name*, were made, with the result that with the knowledge of the contractor, payments were allowed which were greatly in excess of the material delivered.

"All that there was upon this subject was that Mr. Reed, the supervising architect, approved the invoices upon which the material was billed from the quarry by the Marble Company, after going over them at the end of each month with the contractor or his son, who had charge of this part of his father's business. This was clearly not a compliance with the agreement. *An estimate such as is there spoken of necessarily involved not only an approximate judgment upon inspection by the architect or his representative of the quantity and value of the material delivered, having regard to its character, whether granite, marble or carved marble, as to which there was a considerable difference, but the relative value of it to the total quantity which had been contracted for. * * ** It is also too much to ask that the mere looking over of the invoices in the way described should be accepted as in any sense constituting an estimate such as was contemplated. The prejudice of this is manifest, the overpayment made being substantially the amount above the contract price which is now demanded, which, had it been kept back by the contractor, as provided in the agreement, he would have had in hand enough to cover the material unfurnished, without calling upon the surety."

"*Not only were the deficiencies in the deliveries so gross as to put him upon inquiry, but the only basis for the architect's approval to his certain knowledge being the invoices upon which the material was shipped and the representations made at the time by himself and his son, one or both, with regard to them, he was fully advised as to how the approvals were obtained and just what they amounted to, and they are only available to him here, in consequence, for what they stand; that Mr. Van Houten (the owner) was also aware, at least in a general way, from the outstart of the discrepancy in delivery, is shown by his letters, one of January 5, 1898, complaining that not a hundredth part of the material had been furnished, which would only have entitled the marble company to about \$1,000, after deducting the percentage, although bills to the extent of \$4,450 had been already approved and paid; and another of August 4th, declaring that not quite a quarter*

was on the ground, at which time \$30,311 had been paid, as against \$24,750 due, an advancement of some \$5,000. * * * It could not be successfully contended, in view of what has been referred to, either that estimates were really made or that the contractor was without knowledge, and, relying upon the apparent action of the architect in approving invoices, was therefore protected. One or the other, however, was vital to be shown, and in the absence of it the surety was released by the over-payments made in disregard of the agreement, and the verdict to the contrary cannot be sustained."

In *Shelton vs. American Surety Co.*, 131 Fed. 210, the Circuit Court of Appeals said:

"But little, if anything, need be added to the opinion of the Court below, 127 Fed. 736, which sufficiently states the material facts and correctly applies the law. This Court has this day decided in the case of *Zeigler vs. Hallahan*, 131 Fed. 205, that any material alteration of the principal contract to which an undertaking of suretyship is attached, discharges the surety, and the question which this case presents is whether the same consequence results where the contract, though not avowedly altered, is materially departed from by the principal parties to it, without the surety's knowledge and to his prejudice. *We think it does.* He is entitled to rely upon its provisions as definitive of the extent of his responsibility and the law which protects him against any express agreement to materially change them would be of dubious efficacy if the principal parties were permitted to enhance his responsibility by simply disregarding them. * * * We need not pursue the argument. To do so would be but to repeat what already has been well said by the learned judge of the Circuit Court, and in our opinion this case is one which especially calls for enforcement of the rules he applied to it. The contract by which the defendant in error was bound provided 'that no payment shall become due until in each case the contractors shall have delivered to the owner a satisfactory release of liens against the premises,' and yet

it is for a loss which resulted from the owner's making payments without requiring the production of a release of liens that the plaintiff below sought to hold the contractor's surety liable. The judgment is affirmed."

In the case affirmed by the above decision the building contract required that the architect should value the work done and the materials furnished each month and that eighty per cent of his valuation should be paid to the builders, and it provided that no payment should become due until the builders should have delivered to the owner a satisfactory release of all liens against the premises. The plaintiff contended that these provisions were for the benefit of the owner alone, but the Court said:

"I cannot agree to the correctness of this position. There can be no doubt that paragraph 3 was intended for the protection of the plaintiff, and perhaps primarily for his protection, but its enforcement would also protect the surety by compelling the builders to pay the workmen and material men as the work went on, thus diminishing the risk that the surety might suffer from the failure of the builders to fulfil their contract concerning liens. * * * If these releases were demanded bills would be paid as the work went on, for the builders could not obtain releases until they paid the workmen and material men and the result would be that debts could not accumulate and become too heavy a load for the builders to carry. If they could not pay their debts liens would become inevitable. In the enforcement of this provision, therefore, the surety was vitally interested, and the plaintiff's failure to insist upon it is, I think, a bar to recovery. * * * Whether the facts of this case justify me in speaking of what was done as a change of the contract, or whether it is more accurate to speak of it as a departure from the contract, seems to be of minor importance. *The same consequences follow whether it be a departure or a change.* As is said by Brandt, in his work on Suretyship, par. 345: 'Any dealings with the principal by the creditor, which

amount to a *departure* from the contract by which the surety is bound, and which by *possibility* might materially vary or enlarge the latter's liabilities without his consent, generally operate to discharge the surety."

The Court then quotes at length from the decision of Lord Langdale in *Calvert vs. London Dock Company*, to which we have referred, mentions that this case was approved in *Commissioners vs. Branham*, 57 Fed. 179, "where decisions to the same effect from *California*, *Missouri* and *Minnesota* are also cited," and approves the decision in *Gato vs. Warrington*, 19 So. 883, which we have above cited and to which we will again refer.

In *Nat. Surety Co. vs. Long*, 125 Fed. 887, the question was whether when the insured exercised all reasonable care and diligence in endeavoring to perform his agreements, he was thereby excused in failing to perform exactly what he had agreed to do. It was held that so far as the surety was concerned he was bound to do what he had agreed to do and his diligence was no excuse. The Circuit Court of Appeals said:

"The covenant of the plaintiff in the case under consideration was to immediately notify the surety company of any failure or inability of the contractor to construct and complete the building at the time and in the manner specified in the contract, and the question was not whether or not when he failed to give the notice, he had exercised ordinary care to do so, but whether he had actually given the notice immediately upon the appearance of the known inability and failure of the contractor to perform his agreement. The Circuit Court fell into an error when it instructed the jury that the care or negligence of the plaintiff conditioned his right to recover here. * * * The plaintiff failed to keep his covenant before the surety company had in any way failed to comply with those which it had made. On this account he cannot enforce the fulfilment of the

covenant of the defendant. He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform."

The case of *Commissioners vs. Branham*, 57 Fed. 179, is peculiarly like the case at bar. In the present case the contractor was to be paid for work executed and actually in place "to the satisfaction of the party of the first part," and the value of that work was "to be ascertained by the party of the first part." In the case cited the contract provided as follows:

"Payment for said work is to be made as follows, to wit: When said work shall have been, *in opinion of party of first part*, half completed, *said party of first part, or its engineer, shall carefully estimate the work completed*, and pay the party of the second part a sum of money equal to 85% of the cost of the completed work as agreed upon herein, provided said sum shall not exceed the sum of \$7,480, and on the completion of the entire work and its acceptance by party of first part, then full and complete payment as herein provided for shall be made to party of the second part."

It will be observed that the foregoing provisions are identical in substance with those contained in the contract in the case at bar. The Court held as follows:

"Branham and Hege entered upon the construction of the work contracted for and prosecuted the same until they had completed *about one-third part* thereof, when they falsely and fraudulently represented to the plaintiff, through its Board of County Commissioners, that they had fully completed the *one-half part* or more of said work, and asked to be paid therefor the sum of \$10,046.68. The plaintiff, *relying upon these false and fraudulent representations* thereupon paid to them said sum of \$10,046.68. As a matter of fact Branham and Hege had not completed more than *one-third part* of said work and thereupon they abandoned said work

and contract and neglected and refused to proceed with the same and left it uncompleted. The plaintiff was compelled to and did complete said work at a cost in excess of that provided for in the contract of \$13,429.56.

"The contention on behalf of the sureties is that they have been released because the plaintiff, without any estimate having been made by it or its engineers to ascertain whether one-half of the work had been completed, paid to Branham and Hege \$10,046.68—a sum largely in excess of the amount to which they would have been entitled if they had actually completed one-half of the work—and because at the time the payment was made Branham and Hege had not completed one-half of the work and hence were not entitled to receive any payment whatever.

"It is well settled that a surety is bound only by the strict terms of his engagement, and as he assumes the burden of the contract without sharing its benefit he has the right to prescribe the exact terms upon which he will enter into an obligation, and to insist upon his discharge if those terms are not observed. An innocent surety is always a favorite subject of legal protection. It is not a question whether he is harmed or benefited by a disregard of the terms to which he has assented. Where, by the terms of the contract, the principal is to be paid by the debtor or obligee in installments, and the payments are made in advance of the time specified in the contract, the surety will be discharged. * * *

"In the case at bar, over \$10,000 was paid to the principals before, by the terms of the contract, they were entitled to receive anything. Such a gross departure from the terms of the contract, to the prejudice of the sureties, operates to release them from the bond in suit, unless the false and fraudulent conduct of the principals in procuring the payment, deprives the sureties of the right to take advantage of it. * * * But such is not the situation of the plaintiff. * * * By the terms of the contract, the plaintiff or its engineer was required carefully to estimate the amount of work completed before making any payment. The performance of this duty was important for the protection of the surety. * * * It

had no right to rely on such representations and it was bound, either in person or by its engineer, to make the estimate of the work done for itself. *If the plaintiff was misled it was through its own fault, and the failure to perform what was required of it by the contract. In such case it cannot shift the consequences of its own fault and want of care onto the sureties.*"

The Court, in the case cited, discussed with approval the cases of Calvert vs. London Dock Co., *supra*; Bragg vs. Shain, 49 Cal. 131, and Taylor vs. Jeter, 23 Mo. 244, which last mentioned case was cited with approval by the Supreme Court of California in County of Glenn vs. Jones, 146 Cal. 522, and Kiessig vs. Allspaugh, 91 Cal. 231.

There can be no doubt that the law in California is perfectly in accord with the decisions already referred to and particularly with the decision in Commissioners vs. Branham last mentioned.

In County of Glenn vs. Jones, 146 Cal. 518, the Supreme Court of California not only expressly approved the doctrine of Calvert vs. London Dock Co., and Taylor vs. Jeter, but discussed and confirmed Commissioners vs. Branham, *supra*. In the California case just mentioned the building contract required the county of Glenn to pay the contractor Jones, \$1,860 when he should have delivered all material for the building on the building site. After he had delivered a portion of the material he applied for a payment and was paid the first installment of \$1,860. The Court said:

"This payment was prematurely made without the consent of appellants, and at the time it was made the materials that had been delivered on the site did not exceed in value \$1,900, and the total value of the materials necessary for the construction of the building was about \$5,000. * * * The only question that need be discussed is: Did the premature payment made by plaintiff release the surety?

"The contract of suretyship imports entire good faith and confidence between the parties as to the whole transaction. The creditor is bound to observe good faith with the surety. He must withhold nothing, conceal nothing, *release nothing which will possibly benefit the surety. He must not do any act injurious to the surety or inconsistent with his rights. He must not omit to do any act required by the surety which duty enjoins him to do*, if such omission injures the surety. The liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no farther. He has a right to stand on its very terms. (1 Story's Equity Jurisprudence, secs. 324-325; Tally vs. Parsons, 131 Cal. 518; Carter vs. Mulrein, 82 Cal. 169.) *A surety is exonerated in like manner with a guarantor.* (Civ. Code of California, sec. 2840.) 'A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.' (Civ. Code of California, sec. 2819.)

"In our opinion the obligation of the principal was altered in a material aspect without the consent of the sureties. The contractor was under the obligation of placing all the materials on the building-site before he was entitled to any money under the terms of his contract. *By the payment to him before he had done so, he secured the money before performing his obligation.* The pressure which would have been exerted upon him to continue in the performance of his contract and place all the materials on the site, was removed when he received the money. *He received it before he was entitled to it, without the consent of the sureties.* The sureties had bound themselves upon the assumption that the plaintiff would keep its contract in good faith. *We can see no difference in principle if the whole of the contract price had been paid before any of the materials were*

placed on the ground. In such case could any one doubt that the sureties would have been exonerated? The risk of guaranteeing the construction of a building to be paid for when completed and accepted, is quite different from the risk of guaranteeing its construction, if the whole contract price should be paid in advance. In the one case the contractor can only get the money by performing his contract, while in the other he would only pay out the money already received, in performing it. In this case the sureties agreed and guaranteed that Jones would place all the materials on the building site, on condition that he was to receive no money until he had done so; they did not agree that if paid in advance he would place such materials on the site. By the payment, the hope of reward for further performance was lost, the temptation to act dishonestly was increased.

"It is said in Brandt on Suretyship and Guaranty (2nd Ed., Vol. 2, sec. 397): 'A surety for the completion of work to be performed by the principal, when, by the terms of the contract the principal is to be paid by installments, is discharged if the principal is paid faster than the contract provides. The surety is thereby deprived of the inducement which the principal would have to perform the contract in due time.' * * *

"The fund which the plaintiff should have held as security, was given up without the consent of the sureties. * * *

"Finally, respondent contends that if the rule be applied as we have endeavored to show it should be, the sureties could only be released to the extent of the premature payment. We do not think the facts of this case warrant the application of such rule. * * * We think it the better rule in a case like this to hold that the sureties are entirely released. Where plaintiff willfully departed from its contract, and gave the contractor money not due him, and the damages occurred by reason thereof, we do not feel called upon to enter the field of conjecture as to whether or not the loss should be shared by the parties."

In *Kiessig vs. Allspaugh*, 91 Cal. 231, the Court said:

"The appellant Lundeen was a surety, and as money sufficient to satisfy all of the liens mentioned in the complaint was, or *ought to have been*, in the hands of the plaintiff at the time of his settlement with the contractors, he should have so applied it, instead of paying it to the contractors. This balance was to be retained in his hands as an additional security against liens upon the building and in equity *he held the same also for the benefit of the sureties*. It was a special fund to which they had a right to look for their indemnity, and in view of which it must be supposed that they assumed the obligation of sureties, as the original contract is referred to in the bond as the inducement or consideration for its execution, and *the plaintiff was not authorized to surrender it without their knowledge or consent, and having done so the appellant was discharged*. (*Bragg vs. Shain*, 49 Cal. 131; *Taylor vs. Jeter*, 23 Mo. 244.)

"The failure of the plaintiff to retain this balance or to apply it for the satisfaction of the obligation for which the appellant was surety, does not present the case of a mere neglect on the part of a creditor to insist upon a set-off in his favor arising out of some other transaction, before paying what might be due on a particular contract, but was the neglect to resort to a fund already in his hands for his own protection in the very matter for which the defendant was a surety, *and which fund was therefore charged with a trust in favor of appellant, and its surrender without his consent constitutes a defense to this action*."

In *Bragg vs. Shain*, 49 Cal. 131, the building contract provided that the owner, the First Congregational Society, should pay the contractor in installments on the 1st day of every month, to the amount of 75% of the value of the materials furnished and work done and certified to by the architect. During the progress of the work the society paid the contractor, Shain, on the contract, the sum of \$27,766.63.

being more than the 75% provided for in the contract. The Court held that as to the surety the case was not distinguishable in principle from those of Taylor vs. Jeter and Calvert vs. London Dock Company, and said:

"We are of opinion that the failure of the Congregational Society to retain in their hands 25% of the contract price as stipulated in the contract with Shain, operated to release the defendant Bonnet as the surety of the latter."

In Queal vs. Stradley, 90 N. W. 588, the building contract provided for payments in installments as follows: 85% of labor and material as put into the building, the contractor to furnish receipted bills or waivers for material and labor as work proceeded, and all payments to be made on the written certificate of the architect to the effect that such payments had become due. The Court said:

"Certificates were issued by the architect and payments made to the contractor Stradley without requiring the receipts or waivers provided for in the contract. It is a familiar rule that sureties may rely upon a strict performance of the contract between their principal and the creditor, and if the performance of the contract is materially varied without the assent of the sureties they are released.

"The requirement of the contract that the money due thereon be paid only on receipted bills or waivers for labor and material was a very material one for the protection of the surety, and a departure from that provision created a condition to which the surety had not assented in the bond or elsewhere. Money thus paid to the contractor, *although not in excess of the 85% provided for in the contract*, may have been used for the purposes not connected with the construction of the building in question. Many of the payments were also made without certificates from the architects, which was a violation of the terms of the bond."

In *Electric Appliance Co. vs. U. S. Fidelity & Guaranty Co.*, 85 N. W. 648, the Court said:

"The contract provided that before the final payment should be made by the city or be deemed to be due, the contractors should present receipts in full for all labor performed and materials furnished in the construction and installation of the plant. The complaint alleges that the contractors fully complied with the conditions of the contract, except the payment of plaintiff's claim and the claims of others, and that the city duly accepted the plant and paid the contractors therefor. No provision in the contract required any payment of the contract price until the work was completed and accepted. The city paid the contractors in full for the plant and the inference is irresistible that such payment was made in defiance of the express terms of the contract that it should not be made until receipts in full had been produced. * * * *The surety had a right to rely upon the fact that the city would hold the contractors to strict fulfillment of their obligation.* Any variance therefrom to the prejudice of the surety would work his discharge. This is elementary. That this stipulation was of importance to the surety admits of no doubt. That it was broken by the city is certain. No successful attempt can be made to resolve the undertaking of the surety into different factors, and say that they are independent and one subsists for the benefit of this plaintiff, and another may fail because of the conduct of the assured. So far as this case is concerned, the obligation of the surety is a unit and no liability can be predicated thereon except in accordance with the terms of the contract. This is not shown by the complaint, and hence this action cannot be maintained."

In *Backus vs. Archer*, 67 N. W. 912, payments were to be made as the work progressed. The work was abandoned by the contractor. The Court said:

"It is conceded that at the time work was stopped upon the building the plaintiff had paid considerably more money than was due by the terms of the contract.

* * * This being in contravention of the terms of the contract, released the sureties, *pro tanto* at least. Did it release them from all liability?"

The Court held that it did and cited *Calvert vs. Dock Company* and other English cases, saying:

"The American authorities are in harmony with the foregoing English cases,"

and citing, among others, *Bragg vs. Shain*, 49 Cal. 135; *Taylor vs. Jeter*, 23 Mo. 251; *St. Mary's College vs. Meagher*, 11 S. W. 608, and *Commissioners vs. Branham*, 57 Fed. 179.

In *St. Mary's College vs. Meagher*, 11 S. W. 608, referred to in the last cited case, the Court said:

"The settlement, whether final or partial, had between the appellant and Haley, in October, 1884, had the effect to release the appellee from liability, as the college then had by virtue of its contract with Haley, in its own hands, ample security for its own protection and that of Meagher, but confiding in the representations of Haley, paid him the money when there is much evidence in this case conducing to show that Haley failed to comply with his agreement. * * * One Leonard, skilled in the construction of such buildings, was to inspect and determine the character of the work as it progressed, and his decision as umpire was to control the action of the parties to the contract, and particularly that of the appellant. The appellant, however, on the representation of Haley as to the character of his work and desiring to occupy a part of the house, paid him the money due on his contract, reserving \$800 to pay for plastering and painting and the \$1,000 Father Fennessy had agreed to pay the appellee Meagher, so the release of the indemnity to all the parties (the retention of 50% of the value of the work done) by the payment of the money to Haley was a release of the surety Meagher, as the latter had the right to look to the protection of the contract afforded him when becoming bound for Haley's undertaking. It is insisted, how-

ever, that the misrepresentations induced the settlement in October, 1884, and therefore the surety remains bound. We think not. It was the duty of the appellant to retain this money until the work was inspected and approved by a man of its own selection, and in relying on the representations of Haley, if false, and paying him the money, the liability of the surety at once terminated."

In *First Nat. Bank vs. Fidelity & Deposit Co.*, 40 So. 413, the Court said:

"When a party enters into a contract to do certain work and on certain terms, and procures a surety to guarantee the faithful performance of the work, the surety necessarily contracts with reference to the contract as made. The terms of the contract become a part of the terms of the bond; otherwise the surety could never know what obligation he was assuming. The contracts are made at the same time. The surety's bond recites that whereas the building contract has been made, etc. Then, in the absence of any explicit declaration to that effect, it is difficult to see how the Court can undertake to say that certain provisions are made for the benefit of the principal alone, and can be waived or changed by him without the consent of the surety. This is a matter, however, that has been so thoroughly discussed by the Courts in England and in this country, and the trend of the best authorities is so evident that it seems useless to go over the arguments of the Courts. The leading case in England is that of *Calvert vs. London Dock Co.*, 2 Keene Ch. 625, and the Supreme Court of the United States, in an able opinion by Justice White, in which he reviews the decisions of that Court and others, plants itself squarely on the English doctrine. * * *

"We hold that under the contract and bond in this case, which constitute one transaction, if the plaintiff did not pay for the work and the material in the manner provided by the contract, but instead thereof, by an arrangement made either at the time the contract was made or afterwards with the contractor, without the

consent of the surety, permitted the contractor to overdraw his account, so that considerable amounts of money were paid to him before any certificates were issued by the architect, and the material was paid for without any estimate and before delivery and without any regard to the retention of the percentage required, trusting to the certificates and estimates to be credited on said general account, then this was such a departure from the terms of the original contract as to release the obligation of the surety. * * * Said provision in this case is one of the conditions of the contract, and it cannot be said that it is a mere security for the payment of such money, but it is reserved as much as a stimulus to insure the completion of the work by the contractor, as for a mere security of the amount of money. * * *

"Appellant did not choose to resort to its surety but undertook to attend to the matter itself, contrary to the provisions of the contract. It is not for the Court to say why the parties provided for the manner of payment and the reservation of the 10%, though it is easy to suppose that it was for the purpose of having a continual stimulus to the contractor to finish the work, thus operating as a security to the surety as well as for the security of the owner. However that may be, it would be utterly futile to make these requirements and then to provide in another clause that the owner might disregard it and pay for all the materials furnished without inspection or estimate. * * *

"It is not for the Court to say why these stipulations were valuable to the surety company though very good reasons readily occur to the mind, and the result in this case illustrates them. It is sufficient that they were a part of the contract, and according to the authorities heretofore cited, the surety company had a right to demand that they be complied with before it could be made liable on the bond."

In *Gato vs. Warrington*, 19 So. 883, the Court said:

"It is apparent from the contract that in paying for the construction of the building appellant reserved the right to pay McClatchy as the work progressed upon

signed and receipted weekly pay-rolls and for material on the ground. The proof shows that appellant advanced over \$3,000 to McClatchy to pay laborers and not on receipted pay-rolls. The receipts offered in evidence show over \$3,000 paid to McClatchy without reference to any receipted pay-rolls and appellant does not even claim that this amount was paid out on receipted pay-rolls. If he paid this money in disregard of the terms of the contract he could not hold the sureties responsible for it, as any material *departure* from the agreement had the effect to release them."

II.

Plaintiff in error is concluded by its payment to the contractor, by the certificates authorizing the same, and by its permitting the completion of the building.

If plaintiff in error may now be heard to say that the work for which it paid was grossly defective, and such as could not possibly satisfy any reasonable man, and that the certificates of its agents declaring it perfect were false, then no liability exists in this case, as we think we have shown. If, on the other hand, defendant in error may not now be heard to attack its own conduct in approving and paying for the work, then, as the subsequent work is not in question, the building must be held to have complied with the plans and specifications, and no liability exists in this case. It matters not which alternative is chosen. The result is the same.

On the latter theory, a strong case of estoppel presents itself. The surety had a right to rely upon the Government's holding the contractor to a faithful performance of his part of the contract, and upon its faithfully performing its own part thereof. One duty it assumed was to ascertain the value every month of the work installed. (Tr. p. 68.) The

surety was entitled to rely on its doing so, and upon its doing so carefully, in good faith, and with its eyes open, and not upon a mere pretense or shadow of an investigation. It ought not now to be allowed to say that its investigation was a mere delusion and snare. The position of the surety is hopelessly prejudiced by the approval of the work and payment therefor, if the approval is a mockery and the payment vain. No notice of any defect in the work or in the approval thereof was given the surety until January 16, 1906. (Tr. p. 332), six and a half months after the second certificate was issued, five months after the work was finished, over four months after the building was rejected, nearly two and a half months after the building was destroyed by fire while still in the contractor's possession, nearly three weeks after the contractor was expelled from the Reservation, and three months after the contractor, on the demand of the Government (Tr. pp. 131, 157, 280, 320, 322), and with its consent, began to tear down the finished building and reconstruct it. During all this time, while all these dealings were going on between the Government and the contractor without its knowledge, and the building it had guaranteed was being demolished by those parties and by the elements, it remained secure in the belief that the building had been properly constructed, because the Government's officers had solemnly said so, on their honor and over their signatures, and had paid the contractor accordingly. Ought they now to be heard to say that their every word and act in this respect was a fraud?

After issuing these written approvals of the work, and making payment thereon, the Government further acquiesced in the situation, even after it acquired actual knowledge of what are now claimed to be defects; instead of giving the contractor the notice required by the contract, and compelling him to stop work and tear down the building and reconstruct it, the Government gave him no such notice, and required him to do nothing, but on the contrary, permitted him to

superimpose on the defective structure additional work, to put good work on top of bad, and to complete a building which, on its present contention, could only be made good by being torn down. Not only its written approval of the work and its payment therefor, but its every act lulled the surety into security. Its approval throughout, until two months after the completion of the building, when the contractor did at last begin to tear it down, was open and notorious; its criticisms of the work, made privately to the contractor, were, as to the surety, clandestine and vain.

After permitting the surety to repose upon the faith of their written approvals, their payments to the contractor, and their permission to complete the work already paid for, until the lapse of time and all the intervening changes in the situation, brought about by themselves, had prevented the surety from taking any measures for its own protection, ought the Government's officers to be allowed to make capital now of their own misconduct, or laugh in their sleeves at those who placed reliance "on their honor"?

16 Cyc. 722:

"This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence, induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. It consists in holding for truth a representation acted upon, when the person who made it, or his privies, seek to deny its truth, and to deprive the party who has acted upon it of the benefit obtained."

16 Cyc. 771:

"When a person by concealing facts in his possession induces another to act in a manner other than he would have acted had he known such facts, he will afterwards be estopped to set up such facts to the other's prejudice."

16 Cyc. 772:

"A recognized proposition as to estoppel *in pais* is that if in the transaction itself which is in dispute a party has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading, and has led, the other to act by mistake upon such belief to his prejudice, he cannot be heard afterward as against that other to show that the state of facts referred to did not exist."

16 Cyc. 805:

"While waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies, or *objections which he is entitled to assert*, he will be estopped to insist upon such rights, remedies or *objections* to the prejudice of the one misled."

In *United States vs. Hurley* (C. C. A.), 182 Fed. 776, the building contract contained provisions relating to certificates and the control of the work by the Government's representative, very similar to those in the case at bar. It was held, against a claim that the work was defective, that the certificate of the Government's officers, on which payments were made, was conclusive as to the character of the work. The Court said:

"We think that in the case at bar, the conclusiveness of the certificate of the officer in charge, who had complete control of every step in the work, and whose every direction the contractor was bound to obey, appears unavoidable from the force of the language employed in the contract."

In *Quinn vs. New York*, 45 N. Y. S. 7, in the face of a provision in the building contract that the city of New York should not be estopped by any certificate of its inspector or

other officer "from at any time showing the true and correct amount and character of the work which shall have been done and materials which shall have been furnished," the Court held that the city was precluded by such certificates from attacking the quality of the work. Payments were required to be made on such certificates, for work done, "*to the satisfaction*" of the Commissioner of Public Works. The Court said:

"The claim of the defendant is that although the materials furnished were of the general kind required by the contract, and the pavement was laid generally in the way that the contract directed, yet the materials furnished were not good of their kind, and were not properly put into the pavement, so that the work, when completed, was not of the quality required by the contract. We do not think that the 'estoppel certificate,' so called, gives the defendant the right to raise these questions. The proof excluded amounted simply to showing that the work was not properly done. It was not denied that the pavement was laid, and that it was of the kind contracted for; but it was said that it was not good of its kind. This, we think, was not within the estoppel clause. The word 'character,' which is there used, is not perhaps an entirely accurate word to express the meaning the parties intended, but a fair construction of the word as used in this connection is that the defendant might show the true and correct kind of the work that had been done,—that is to say, that the work done was not of the general kind required by the contract. That, we think, is as far as this clause allows the defendant to go in that connection. *The certificate of the engineer and the acceptance of the Commissioner of Public Works are the criteria by which it must be judged whether the work was good of its kind; and if that certificate has been given, and the work has been accepted, then, in the absence of fraud or palpable mistake, the plaintiff may insist upon the certificate, and the defendant cannot question it.*"

In *Katz vs. Bedford*, 77 Cal. 319, 322, the Court said:

"The Court finds that as to the side of the street on which the work is found to be defective, the defendant saw the work done from day to day, as it progressed, and when it was completed, and with full knowledge of its condition paid a part of the amount due therefor to plaintiff, and permitted him to go on and do the work on the other side of the street thereafter, and made no objection to the manner in which it was done until the whole work was completed, and that before it was entirely completed they caused a part of it to be swept off and used the same at an auction sale of lots belonging to them and fronting thereon. Counsel for appellant claims that the Court below regarded this as an acceptance of so much of the work, and contends that in this the Court was in error. Whether the facts show an acceptance, strictly speaking, or not, it is clear to our minds that it was such conduct as should estop the defendants from defending against the whole contract price of the work."

In *Toppan vs. R. R. Co.*, 24 Fed. Cas. 56, 59 Case No. 14099, the Circuit Court said:

"It is a principle of law of universal application (and as just as it is general) that admissions, whether of law or of fact, which have been acted upon by others, are conclusive against the party making them, in all cases between him and the person whose conduct he has thus influenced; and the principle is founded upon grounds of public policy, that a man shall not be permitted to repudiate his own representations."

III.

Disregard of the provisions relating to the time of payment releases the surety.

Payments were required to be made, under the contract, "at the expiration of each thirty (30) days during the prog-

ress of the work, the amount of each payment to be computed upon the actual amount of labor and materials expended during the said period of thirty (30) days for which partial payment is to be made (the said value to be ascertained by the party of the first part)." (Tr. p. 68.)

No regard was paid to these provisions by either party to the contract.

Several important conditions are therein involved. One is that the Commissioner should ascertain the value of the work *every thirty days*. Another is, that the work for which payment was to be made should be work installed during *thirty days* only. Another is, that the payments should be actually turned over to the contractor *every thirty days*, or at least that all work preliminary thereto on the Government's part be performed, and the payments ready to be made, *every thirty days*.

The importance of these provisions to the surety is obvious. The latter was thereby assured that no longer period than thirty days would at any time be permitted to elapse without a competent valuation of the work by the Government's representatives. The more numerous such valuations, the more beneficial to the surety. If the surety knew that the Government would see to it at short periods that the work complied with the contract, its risk would be comparatively slight. That assurance the surety received from the provision mentioned. From the vital interest of the Government itself in the quality of the work for which it was required to pay, the surety was entitled to believe that the Government's promise would be faithfully kept, not only to value the work carefully and accurately, but to do so at the short intervals specified. By that means it would be difficult to cover up or conceal any part of the construction from the inspector, all defects in the materials would be easily discoverable, and no considerable stage could be passed without the surety's having

the Government's stamp of approval on that particular stage. Obviously an inspection of partition walls, for example, would be an entirely different matter after the completion of the plastering from what it would have been before. Thus a frequent and highly important check on the contractor was guaranteed to the surety. The value of such a check consisted largely, of course, in its frequency. Its value would be less at intervals of sixty days than at intervals of thirty. The surety's risk would be very much less in the latter case. And any enlargement of the risk, by a departure from the contract on the part of the insured or with its consent, releases the surety.

Moreover, it was of the greatest moment to the surety that the work be paid for every thirty days, and not at greater intervals, because such frequent payments ensured the financial ability of the contractor to proceed with the work, and offered to him an incentive to do so. It might very well be, and it frequently happens, that a contractor's resources are totally insufficient to carry the work unless he is paid promptly for the work installed. Payments to him as often as every thirty days may mean the difference between work faithfully completed and work skimmed, delayed and abandoned. In this case, the surety relied, in making the bond, on the Government's assurance that the contractor would be paid every thirty days. Thereby the contractor would be enabled to provide his labor and materials promptly to pay for them at once, and to prosecute the work diligently, without danger of being stopped by the lack of funds. On the other hand, payments at greater intervals, say ninety days, would have given no such security, and might have resulted in disaster; and no doubt the surety would not have signed the bond on such conditions. At any rate, it did not sign the bond on such conditions and none can be imposed upon it except those it assented to.

Nor is the Court required to inquire into the reasons which made these provisions of value to the surety, nor whether they were of any value to it at all. The breach of the contract might be of positive advantage to the surety, and the result would be the same. "It is not a question of whether he is harmed or benefited by a disregard of the terms to which he has assented." It is enough that the surety contracted with reference to provisions which have been disregarded. Its release flows inevitably therefrom, without further inquiry. (Commissioners vs. Branham, 57 Fed. 181; Bank vs. Fidelity & Deposit Co., 40 So. 418.)

Work was commenced under the contract on April 12, 1905. (Tr. pp. 292, 345.) No valuation of the work was made by the Government until May 23, 1905, and no payment was made to the contractor until June 10, 1905, or after; forty-one days and fifty-nine days respectively after work commenced. No valuation was thereafter made until June 30, 1905, and no payment was thereafter made until July 21, 1905, or after; seventy-nine days and one hundred days, respectively, after work commenced. Under the contract, payments should have been made on May 12, June 11, July 11, and August 10, 1905. The contract was wholly disregarded in this respect. Such a departure releases the surety.

It must be remembered that a *departure* from the contract releases the surety in exactly the same manner as a formal *alteration* of the contract. This has been shown by the decisions cited under the first point.

Shelton vs. American Surety Co. (C. C. A.), 131 Fed. 210;

"The question which this case presents is whether the same consequence results where the contract, *though not avowedly altered*, is materially departed from, by the principal parties to it, without the surety's knowledge, and to his prejudice. We think it does. He is entitled to rely upon its provisions as definitive of the extent of his responsibility, and the law which protects him

against any express agreement to materially change them would be of dubious efficacy if the principal parties were permitted to enhance his liability by simply disregarding them."

We refer the Court to all the cases cited under the first point, as sustaining our contention on the present point, which indeed is the same in principle, and to the following language of this Court in

Coughran vs. Bigelow, 164 U. S. 301, 41 L. Ed. 442, 447:

"The obligatory portion of the bond was expressly made dependent on the proviso that Coughran and Cottrell should comply with their portion of the contract that day made and a copy of which was attached, one of the terms of which was that the sum of \$3,334 should be paid on *October 1, 1890. This payment was not so made on that day.* The acceptance by the vendors of the payment subsequently made, on or about *October 12*, was, of course, a waiver by them of their right to rescind and declare a forfeiture, but such waiver did not bind the sureties, who were relieved from liability by the failure of the vendees to perform the precedent act of payment *at the time provided in the contract.*"

IV.

Requiring and permitting contractor to retain possession and reconstruct building after rejection constituted departure from contract, abrogated the same, waived contractor's previous breaches, extended his time for performance, contributed to loss by fire, surrendered a valuable security, enlarged the surety's risk and discharged the bond.

The building was finished by the contractor on August 16 or 18, 1905. (Tr. pp. 145, 184, 310.) From September 2 to September 7, 1905, it was inspected by John Charles, specially sent by the Commissioner for that purpose, with

the assistance of Dr. Perkins. (Tr. pp. 187, 194.) He rejected the building, and Perkins notified Boggs of the rejection by letter dated September 16, 1905. (Tr. p. 123.)

After the rejection the Government did not take possession of the building, but permitted it to remain in the possession of the contractor. (Tr. pp. 15, 350.) On November 4, 1905, while in his possession, it was destroyed by fire. (Tr. p. 304.) Boggs had had the building insured in October for his own benefit for \$8,000.00, and after the fire he collected \$6,000.00 from the fire insurance company, and retained it. (Tr. pp. 211, 212, 213, 286.) The Government received no part of this sum, took no measures to secure it, and maintained no fire insurance on the building on its own account, the building being, by its own action and consent, out of its possession after its completion.

In the meantime new arrangements were being made between Boggs and the Government, and new action was being taken by them, not contemplated by the contract. Until after the fire, Boggs, Perkins and the Commissioner were in constant communication by letter and telegram, and Boggs and Perkins communicated with each other orally, whereby it was agreed between all three that Boggs should tear down the building and reconstruct it in accordance with the plans and specifications, and deliver the new building at the earliest possible moment. This agreement was acted on and executed, until interrupted by the fire. We have already referred in detail, in the statement of the case, to the correspondence and conversations and what was done thereunder, and the following short statement will now suffice:

Sept. 24, 1905, (Tr. p. 155). Letter from Boggs to Perkins offering to reconstruct.

Sept. 29, 1905. (Tr. p. 316). Telegram from Perkins to Commissioner reporting Boggs' offer.

Sept. 29, 1905, (Tr. p. 317). Letter from Perkins to Boggs requiring him to tear down and reconstruct, and demanding activity and immediate delivery of new building.

Oct. 3, 1905, (Tr. p. 156). Letter from Perkins to Boggs specifying certain details of construction required to be corrected, and demanding activity and "erection of the building at the very earliest possible date."

Oct. 8, 1905, (Tr. p. 128). Letter from Boggs to Perkins announcing intention to commence re-building the following week.

Oct. 11, 1905, (Tr. p. 319). Telegram from Perkins to Commissioner reporting Boggs' letter.

Oct. 11, 1905, (Tr. p. 319). Letter from Perkins to Commissioner forwarding Boggs' letter, and stating that he had told Boggs' men, who had arrived, that he had no objection to their beginning work, and that nothing would be tolerated but the erection of the building in exact accordance with the plans and specifications.

Oct. 12, 1905, (Tr. p. 157). Letter from Perkins to Boggs, requiring him to say at once whether he intended to rebuild immediately in exact accordance with specifications.

Oct. 14, 1905, (Tr. p. 302). Reconstruction commenced.

Oct. 17, 1905, (Tr. pp. 126, 285). Conversation of Boggs with Perkins, in which latter authorized him to proceed with reconstruction, and assented to his putting building into condition.

The work proceeded without interruption until the fire occurred, at which time the floors, windows, window-frames, doors, door jambs, wainscoting and plastering had been removed, and the chimneys taken down. (Tr. pp. 304, 312, 313.)

Perkins made no objection (Tr. pp. 306, 313), though he was about the work every day (Tr. p. 304), but on the con-

trary expressly demanded that it conform to the plans and specifications (Tr. pp. 304-313), gave directions and made suggestions as to particular work, and stated that he was satisfied with the work (Tr. pp. 305-6).

Oct. 17, 1905, (Tr. p. 126). Letter from Boggs to Commissioner, stating that he was on the ground with men and materials to tear down and make good all defects.

Oct. 19, 1905, (Tr. p. 320). Letter from Perkins to Boggs reporting Commissioner's authority to latter to reconstruct, with Commissioner's promise that if the building was erected as specified it might be accepted.

Oct. 21, 1905, (Tr. p. 321). Letter from Perkins to Commissioner relating to plaster proposed to be used.

Oct. 21, 1905, (Tr. p. 322). Letter from Perkins to Commissioner forwarding copy of former's letter to Boggs (evidently of Oct. 19, 1905), reporting that he had demanded personally of Boggs that the work be done in exact accordance with the specifications, and stating that he would make Boggs put up the building at an early date, and would make him get busy and deliver the building at as early a date as possible.

Oct. 23, 1905, (Tr. p. 158). Letter from Perkins to Boggs relating to kind of flooring to be used.

Oct. 25, 1905, (Tr. p. 321). Telegram from Boggs to Commissioner relating to same.

Oct. 27, 1905, (Tr. p. 131). Telegram from Commissioner to Boggs demanding reconstruction in exact accordance with plans and specifications.

Oct. 27, 1905, (Tr. p. 131). Letter from Commissioner to Boggs, confirming telegram, and requiring him to follow exactly "the plans and specifications already furnished him for the reconstruction of this building," to tear down the walls if necessary, and to do whatever else might be necessary.

Oct. 27, 1905, (Tr. p. 277). Letter from Commissioner to Perkins, forwarding copy of last letter, and requiring him to notify Boggs and the Department in case any of the reconstructed work should not be up to specifications.

Oct. 30, 1905, (Tr. p. 280). Letter from Commissioner to Perkins stating that the building must be erected as specified, otherwise it would not be accepted, that if the walls were faulty they must come down, that no inferior work would be accepted, and instructing Perkins to notify Boggs to this effect and to the effect that the office desired the building turned over to the Government at as early a date as possible.

Perkins testifies (Tr. p. 283) that the instructions given him by the Department were in all cases carried out by him, and that whenever these letters instructed him to notify Boggs of anything he did so.

Nov. 3, 1905, (Tr. p. 129). Letter from Boggs to Perkins, asking what brand of plaster he wanted, and declaring his intention to raise the roof, adjust timbers, increase height of walls, build frames into walls, and bond partitions.

On the next day the building was destroyed by fire, and Boggs collected the insurance.

Here we have, not only a written agreement in relation to these matters, but an actually executed and accomplished fact, constituting not merely an agreement for the alteration of the original contract, but a completely realized departure therefrom. With the degree of this departure we are not concerned. If it had existed only one week, instead of nine, the effect would have been the same. If it had continued for ninety weeks instead of nine, the effect could have been no greater. Under the contract, the time for completion was September 1, 1905, not later. It was not contemplated either by the parties or by the surety that the contractor should have more than one bite at his cherry; it was not provided

that as a reward for his faithlessness he should be entrusted a second time with the commission he had once betrayed; it was intended that he should erect one building, and not two, and that he should do so before September 1, and not after. That he should, after that date, be required and authorized to tear down the only building which the surety had guaranteed, and erect another one in its place, "at as early a date as possible," "at the very earliest possible date," was neither specified in the contract nor dreamed of by the parties.

When the contractor failed to deliver the building as specified on time, the Government was then bound to exercise what rights it had under its contract, and if it chose to waive them and require and permit the contractor to erect another building, giving him at least nine weeks after September 1 for that purpose, it did so at the cost of releasing the surety.

Under that contract, if the contractor failed to complete the work or any part thereof "*in accordance with this agreement within the time herein provided for,*" the remedy of the Government was to take possession of the work, and at the expense of the contractor to supply all labor and materials "necessary to be purchased or supplied by reason of the default" of the contractor. (Tr. p. 66.) The Government should have taken possession and immediately let the work to some one else on a precisely similar contract, with precisely similar plans and specifications, charging the contractor and the bond with any excessive cost thereby incurred.

Instead of this, the Government declined to take possession, permitted the defaulting contractor to retain possession of the work which it should have seized, allowed the building to be destroyed by fire while thus out of the custody it should have itself maintained, deprived itself thus of the power to keep the building insured, and to reimburse itself out of any

insurance money for its losses, entrusted with the erection of a new building a contractor who had shown himself unworthy of any confidence whatever, gave him additional time for doing what he was required to do and had failed to do before, and retained as its own representative in charge of the new work the same servant whose gross incompetence, admitted at all times by himself, had proven itself to the Government by his declaring all the bad work good, and his occasioning all the loss suffered by the Government.

Could anything more obviously discharge the bond?

In considering the effect of this situation, it must be remembered again that a *departure* from the contract has exactly the same result as an *alteration* of the contract. This we have already shown. We are therefore concerned not so much with what was *agreed* as with what was *done*. As the correspondence shows, a *written* agreement (importing a consideration, of course) was made between the Government and Boggs, allowing him an extension of time for completing the building; but the more important consideration is, that this was acted on, and a *departure* from the contract in fact and in deed *effected*. Not only was there in the original contract no provision looking in any way to an extension of time, except in case of delay caused by the Government, which is not involved in this case, but liquidated damages of \$20.00 were thereby imposed on the contractor for each day's delay beyond September 1, 1905, (Tr. p. 64), and it was thereby provided that no addition to or alteration from the work should "be construed to extend the time fixed herein for the final completion of the work." (Tr. p. 66.) We are unable to conceive any reason why the customary rule of law should not apply.

U. S. vs. De Visser, 10 Fed. 642, 657:

"In this case the postponement was not apparently for any interest of the government, but was given as a

favor to third parties, then owners of the goods, who had requested it of the secretary. Such a favor could not be granted at the expense of the surety, by prolonging his risk, without his assent.

"A surety's contract is in this respect *strictissimi juris*. Any prolongation of his risk, or change in the subject matter of it, is an alteration of the contract in an essential particular; and if made without the surety's consent discharges him from liability; and this applies equally to the United States, and to any alterations of the contract made through the acts of its officers. * * *

"If the secretary of the treasury had by express order, at the owner's request, extended the period of three years within which to pay the duties, without the surety's consent, it cannot be doubted that such an extension of time would have discharged the surety, because it extended the duration of his risk. * * *

"An extension of the time of payment discharges a surety, because it prolongs his risk by postponing his right of payment and subrogation, and by depriving him of his right of immediate recourse by suit against his principal for indemnity at the time when the debt was originally due. The contract by such extension is varied to his prejudice. * * *

"The voluntary and deliberate postponement of the sale in this case effected precisely the same result, and operated in the same manner upon the surety's rights, as an extension of credit would have done. It necessarily prolonged his risk and suspended his right to proceed for his indemnity for three months, until after the next regular sale; and it resulted in a prolongation of fifteen months. As respects the surety the postponement was precisely equivalent to an extension of credit to the owners of the goods until the next sale, and should, therefore, be held to discharge the surety in the same manner.

"Under the authorities above cited (*U. S. vs. Kirkpatrick, &c.*) mere laches by government officers in effecting a sale would not avail as a defense, but the affirmative postponement of the sale by the special order of the secretary of the treasury was not laches, nor

more than an express extension of credit would have been, nor was it an act in pursuance of "prescribed regulations." It was an isolated, independent order, contrary to those prescribed regulations. If one deliberate postponement can be upheld without the surety's consent, the sale may be postponed indefinitely, his risk be indefinitely extended, and his liability to loss through the insolvency of his principal be indefinitely increased. Such a liability to an indefinite extension of the surety's risk cannot have been designed, and ought not to be sustained, under the warehouse system, which requires sureties to be given to so vast an extent in the commerce of the country; nor can such a possibility be supposed to have been contemplated by the sureties who have entered into obligations under it."

In *Earnshaw vs. Boyer*, 60 Fed. 528, it was held that a change in the contract as to time was effected by correspondence duly acted on, and that the surety was thereby released. To a letter asking one month's extension of time for shipment of the goods, a letter was returned saying, "the arrangement which you propose regarding the extension of time for the delivery of Marbella ore is satisfactory." The Court said:

"This reply was taken as an acceptance of the proposal, and the arrangement referred to was, accordingly, pursued. It is quite manifest that the parties understood this to be a new agreement, by which the definite time which they both supposed had been originally agreed upon for the completion of shipments was extended for one month. But if this was a mistake; if the effect of the contract was to require that the shipments should all be made in a *reasonable time*, yet the substitution of a *fixed and definite time* would materially change it. * * * The principals were dealing with a matter which concerned the surety as much as it did themselves, and yet (not considering this matter of reasonableness at all) they agreed upon an arbitrary time, without consulting him, and in utter disregard of his right either to be made a party to any such agreement, or to have the question of reasonable time determined by judicial investigation."

By requiring and permitting the contractor to tear down the building and reconstruct it, by declining to take possession of the same, and by granting the contractor an extension of time, the Government waived the defaults which are the subject of this action. The Government in effect said to the contractor: "You have violated your contract in many respects, but if you will now undertake the contract anew, remove your defective work, and do it all over again, we will let bygones be bygones, and we will accept your new work as a full satisfaction of all errors in your old." This was the agreement which was made in writing between the Government and Boggs, and which was in full process of execution when interrupted by the fire, and afterwards finally prevented by the contractor's summary ejection from the reservation. The Government is not now to be allowed to return to its old complaint, for which it thus took that satisfaction which seemed best to it. It was content to rely, for its recompense for past injury, on the new agreement of the contractor. It chose to assume the risk of his performance of that new agreement. It impliedly said to him, in writing, that the new agreement would be accepted in full of his obligations. And it must be remembered that his failure to perform the new agreement in full was due directly to the action of the Government; for in spite of the fire, he was actively engaged in the work, with several thousand dollars' worth of new material on the ground, when, without the slightest reason or excuse, he and his men were ejected suddenly by the Government, not only from the premises but from the reservation itself. Not only did the Government waive all past defaults in favor of a future performance, but it actually, by a most unaccountable display of angry power, made that performance forever impossible. It cannot now go back to its old position, so long ago forsaken.

In *United States vs. Gleason*, 175 U. S. 588, 44 L. Ed. 284, 292, this Court said:

"As no actual damage or loss was definitely shown to have been suffered by the government by reason of the non-completion of the work, and *as no forfeitures were declared at the time of the several extensions, and may therefore be deemed to have been waived*, we affirm that portion of the judgment of the Court below allowing a recovery for the retained percentages of the compensation for work actually done and accepted."

In *Mundy vs. Stevens* (C. C. A.), 61 Fed. 77, 83, the Court said:

"From our examination of the evidence, we do not discover that on August 16, 1892, there was any real danger of the forfeiture of Mundy & Co.'s contract with the government other than from the possible failure to complete the work within the *extended* time. *By the extension in August, presumably, the government had waived past delinquencies.*"

In *Roberts vs. Donovan*, 70 Cal. 108, after an agent had defaulted under his contract with his principals, they made a new agreement, continuing the former's employment and allowing him to work out the debt he owed his principals. In a suit by the principals on the agent's bond, the Court said:

"These acts on the part of the plaintiffs operated a release of their sureties from liability upon the bond sued on: (1) Because of the alteration of the contract made in April, 1879, without the consent of the sureties; and (2) because of the continuance by plaintiffs of Tobin in their employ with knowledge of his misappropriation of their funds—the sureties being ignorant thereof."

To the same effect see

Aetna Ins. Co. vs. Fowler, 66 N. W. 470.

One serious risk assumed by the government in adopting the course it chose, was the risk of loss by fire in the hands of others. It so happened that the risk was a very real one, as the event proved. If the Government had taken possession on September 1, 1905, and declared the forfeiture it in fact waived, its own custodians would have been in a position to guard it against fire, and the fire would perhaps not have occurred; and in any event it would have been able to keep the building insured for its own benefit, and the fire, if it had occurred, would have done it no harm. The insurance money would have reimbursed it to a large extent, at least in the sum of \$6,000.00, for its loss on the contract, and this would have been available to the surety as a credit in case of liability. The building as it stood was worth at least \$6,000.00, and this six thousand dollars' worth of property it voluntarily surrendered up to the contractor, in addition to nearly eight thousand dollars in cash which it had already surrendered to him for work which it knew, or was bound to know, was defective. Here was nearly \$14,000.00 in property and money which the Government voluntarily, and at the expense of the surety, gave to the contractor, on a \$12,709.00 contract, without getting anything in return. Does it not seem preposterous? Was the public property and money ever given away so freely by public officers? What possible excuse can be invented for giving Boggs this valuable building and allowing him to collect its value and put the money in his pocket? Though the law may be ineffectual to protect the Government against its officers, it will not permit such a sacrifice by them of the surety's rights. The insured had in its hands a security of the value of \$6,000.00, to the benefit of which the surety was entitled. When it undertook to give this away, the surety was released. The bond in this case cannot be converted into a fire insurance policy by the means adopted or by any other.

V.

The government prevented the contractor, without notice and without cause, from completing the work; and the bond was thereby discharged.

After the fire, Boggs' men remained on the ground, and under his instructions went to tearing down the walls and cleaning up, preparatory to rebuilding. Hopper, who was in charge for Boggs, communicated to Perkins Boggs' instructions in this regard, and no objection was made. The building having been completely gutted, they took down the walls, cleaned off the stone, and took out and cleaned the sewer pipe on Perkins' instructions. Perkins ordered Hopper to tear out the foundation and re-lay it, saying that it would not do to build on the old foundation again. (Tr. p. 305.) After the fire Perkins was about the place the same as before, back and forth every day. After the fire he repeated to Hopper his direction that the work was to comply absolutely with the plans and specifications. (Tr. p. 306.)

This reconstruction work recommenced on November 22, 1905 (Tr. p. 281), as soon as Boggs had obtained an adjustment of the fire insurance. (Tr. p. 286.)

On the same day, Perkins notified the Commissioner by wire that Boggs had begun reconstruction. (Tr. p. 281.)

The work went on from day to day for more than a week, with the actual knowledge and consent of Perkins and the Commissioner, and under their previous written demands and agreement. On December 1, 1905, without the least hint or suggestion to Boggs or his men of any altered intention, the Commissioner wired to Perkins as follows (Tr. p. 281):

"Boggs matter before Department for instructions. When received will communicate them to you. Meanwhile be careful not to commit the Government in any way."

Evidently something was already hatching among the Washington heads, as early as December 1st. But it was not their policy to let Boggs or the surety know anything about it. Perkins was to keep it dark, and arouse no suspicions. He obeyed the injunction of this wily telegram. The work continued under his direction and control for a whole month longer, without a sign from him or the Commissioner.

On December 24, 1905 (Tr. p. 325), he received from the Commissioner a letter, directing him to notify Boggs and his representatives to vacate the premises, and in the event of their failure to go *at once*, to call on the Indian agent to expel them. (Tr. p. 282.) No reason of any kind was given for this extraordinary action, except that Boggs had failed to comply with his contract *before the fire*. Evidently the fire was considered a sufficient excuse. No mention was made of the fact that since the fire the work had been proceeding as before, with the actual knowledge and consent of the Commissioner and Perkins, and upon the same written demand and agreement as before.

On December 29, 1905, in the evening, *five days* after Perkins had received his instructions, the latter served on Hopper a notice to vacate the reservation *at once*. A similar notice was mailed to Boggs. (Tr. pp. 306, 152, 327.)

Thereupon, of course, work at once stopped, the men left, and Perkins seized all the materials and tools he could find.

The reason why Perkins delayed five days before serving his notice to vacate *at once* is obvious. On December 25, the day after he received his instructions, three carloads of Boggs' materials arrived. They were unloaded on December 28, the day before he served his notice. (Tr. p. 291.) During these five days Hopper was about the place, but Perkins said nothing to him about it. (Tr. p. 284.) Up to the time Hopper was thus compelled to quit, the work was proceeding uninterruptedly. (Tr. p. 284.)

Perkins went so far as to seize not only the materials belonging to Boggs, of the value of \$2,418.58 (Findings, Tr. p. 351), but even the *tools* of Hopper, a workingman. (Tr. p. 325.)

We contend that this prevention by the Government was an act of arbitrary power, without reason or excuse. No reason was pretended to be offered for it at the time, and none has since been invented. The best the Commissioner could find to say was that "there is no good reason, either legal or sentimental, why the Government should permit him to replace the building." (Tr. p. 283.) On the contrary, there was every reason why it should. The Government had chosen this way of retrieving its loss, and had forsaken all others; the whole building had recently been lost to it by fire, through a situation developed by itself; its only hope lay in permitting the contractor to reconstruct the building, which he was then engaged in doing. That the contractor was proceeding in good faith was shown by the unremitting work expended on the building, and by the arrival on the ground of a large and valuable quantity of materials. The most ordinary common sense should have restrained the Government's officers from impeding the work in any way, when at last there seemed a chance of getting their building built, and that within the original contract price, without a loss. But they preferred to stop all that, to let the building lie for more than a year without doing anything, and finally to put up a totally different building, on a totally different contract, at a totally different price. Their spite and pique should not thus have been permitted to plunge the Government into such difficulties. And the surety should not, in any event, be held to answer for it.

But in addition to this, there was a reason, both good and legal, "why the Government should permit him to replace the building." The reason was, that the Government had agreed with him in writing to that effect, and he was then

in process of performing the agreement. Whatever may be said of the effect of this agreement itself on the bond in this case, the Government and the contractor were bound by it. The former had agreed in writing to accept the building, as reconstructed, and to allow a reasonable time for the work; the latter had agreed in writing to all of the terms, and had partly performed his agreement; and the former had accepted the benefit of what he had done. No complaint whatever was made as to the quality of his new work nor as to his progress therewith. Without a warning, and without offering the least reason, the Government simply declares the whole thing off, declines to let him carry out his agreement, declines to perform its own, seizes all his materials, and confiscates the work already done. We think such action was a most high-handed and arbitrary breach of its obligations, releasing the bond.

Nor was any eight-day notice given, as required by the contract, either at this time or at any other since the original beginning of work. Not even a "reasonable" notice was given. For a whole month the Government's officers knew what they had in mind to do, and they deliberately concealed their purpose, and encouraged the contractor to proceed. At the end of that time they ejected him without any notice whatever. "You and your representatives are now informed that you must vacate the San Carlos Reservation *at once*." (Tr. p. 152.) The contract required *eight days'* notice. (Tr. p. 66.)

Mundy vs. Stevens (C. C. A.). 61 Fed. 77, 82:

"The contract of February 2, 1892, whereby Stevens agreed to perform the work which Mundy & Co. had undertaken to do by their contract with the United States Government, expressly provides that Stevens was to do the work 'within the times fixed by said contract and the extensions thereof, granted or to be granted.'

It is then very clear that Stevens was entitled to *the benefit of the extension of the time of performance until January 1, 1893, which the Government had granted in the first week of August, 1892. Hence Mundy & Co. had no right to oust Stevens at the very beginning of the extended time without good reason shown.*"

In *Fidelity & Deposit Co. vs. United States (C. C. A.)*, 137 Fed. 886, it was held that an *interruption* in the contractor's work, for three months, caused by the Government, released the surety. The Court said:

"The defendant, as a surety, was discharged by the default of the Government to remain in lawful possession of the demised premises during the period necessary to enable Conkling to fulfil his contract. The contract by necessary implication included an obligation on the part of the Government to permit Conkling to remove the stone, and in this behalf to secure to him the privilege of access to the premises during the necessary period of his performance. It is quite immaterial that this understanding was not expressed in the contract. * * *

"Even if he had chosen to waive that default, and, when the Government procured the new lease, had resumed work under the contract, but had subsequently failed to fulfil, the *interruption* of three months caused by the act of the Government was a variation of the contract which discharged the surety, and Conkling's waiver would have been ineffectual as against the defendant."

In *Clark vs. Dalziel*, 3 Cal. App. 121, 124, a contract provided that it should remain in force for ten days, and "thereafter until withdrawn by me (the defendant) in writing." Thereafter "the defendant signed a memorandum at the bottom of the contract as follows: 'The above contract is extended to November 5, 1902. I accept the above. R. Dalziel.'" The Court said:

"The memorandum extending the contract to November 5, 1902, did not have the effect of terminating the

contract at that time. It remained in effect until withdrawn by defendant in writing as expressly provided therein. *The extension prevented the defendant from terminating it by notice in writing prior to November 5, 1902.*"

In *Clark vs. United States*, 6 Wall. 543, 18 L. Ed. 916, the contractor failed to complete the work by the day named, and while he was *afterwards* proceeding with it he was interfered with by the Government's officers, to his loss and injury. He was held entitled to recover on account of this interference. This Court said:

"What relation there is between his failure to do all the work by a certain day, and the claim of the Government to subject him to these losses, is not pointed out by the Court, nor is it perceived by us. * * * *If the Government permitted him to go on in the effort to complete the contract*, it surely had acquired no right to compel him to do it in a manner which necessarily involved him in great loss, and to use the embankment as a roadway, to his further injury."

In *United States vs. Smith*, 4 Otto 214, 24 L. Ed. 115, this Court said:

"There was no time specified within which the work must be done, neither was there any power reserved by the United States to direct its suspension. Under such circumstances, the law implies that the work should be done within a reasonable time, and that the United States would not unnecessarily interfere to prevent this. * * * Here the work was stopped by order of the United States. Smith asked to be released from his contract unless he could go on. This was refused until the expiration of sixty days, when he was allowed to resume. As between individuals, *certainly, this would be considered as improper interference, and damages would be awarded to the extent of the loss which was the necessary consequence of the suspension. The United States must answer according to the same rule.* In this respect we cannot consider this case different in principle from that of *Clark vs. United States*, *supra*."

So in the case at bar, the work was by written agreement after September 1, 1905, to be done within a reasonable time, and the law implied "that the United States would not unnecessarily interfere to prevent this."

VI.

The making of a new and materially different contract, after the lapse of more than a year from the date of the ejection of Boggs from the reservation, with changed conditions in the building market, and for a substantially different building, to be constructed according to plans and specifications differing in more than 200 respects from the plans and specifications under the Boggs contract, furnishes, as was held by the Circuit Court of Appeals for the Ninth Circuit, no basis for estimating the damages of the Plaintiff in Error.

During the whole of the year 1906 the Government did nothing in regard to this building. It was not until January 22, 1907, that a contract was executed with one James H. Owen for the construction of a building on the old site. (Tr. p. 214.) This was about a year and five months after the date of completion specified in the Boggs contract, and more than a year after Boggs was ousted. During that long period the building market had changed. Mr. Owen himself admits it. (Tr. pp. 261-2):

"Speaking generally, the cost of building increased during the years 1905-6-7 and has been increasing ever since. Some years it decreases a little and other years up a little, but as a rule it has been increasing. I would not want to go on record as saying that it increased during those years. I am not positive, but I should say that probably, off hand, it had increased since 1905. I should say that the conditions in the building market in regard to building supplies, labor and the like, were different in 1907 from what they had been in 1905."

The Government accordingly, as a purchaser, waited for a rising market, and got it. Its delay is totally unexplained. Without any conceivable reason, the officers postponed action until labor and material had risen in price. They rejected the opportunity for cheaper construction and selected the moment of costlier. And when at last they decided to do something, they made a different kind of contract, with materially different plans and specifications, for a different kind of building, as well as for additional work not included in the Boggs contract at all.

In this regard the trial Court found as follows (Tr. p. 355):

"That the aforesaid contract, plans and specifications between plaintiff and the said James H. Owen were different in many substantial respects from the contract, plans and specifications between plaintiff and the said Augustus W. Boggs; that the building required to be erected and actually erected by the said James H. Owen under his contract, plans and specifications, was different in many substantial respects from the building required to be erected by the said Augustus W. Boggs under his contract, plans and specifications; that \$1,200 of the contract price required to be paid and actually paid to the said James H. Owen under his contract, applied to work wholly outside of the work provided for in the contract between the said Augustus W. Boggs and plaintiff; that \$500 of the aforesaid contract price required to be paid and actually paid to the said James H. Owen under his contract by plaintiff, was for work and materials in excess of what was embraced and included in the contract between the said Augustus W. Boggs and plaintiff; that the cost of labor and building supplies was different in 1907 from their costs in 1905, and that plaintiff waited from the 28th day of December, 1905, to the 22nd day of January, 1907, before entering into a new contract for the construction of said building, and that by reason of the lapse of time and the changes in prices in the meantime, a comparison between the two contracts furnishes no basis for estimating the plaintiff's damages in this case."

A comparison of the two contracts themselves shows the following differences:

The Owen contract required "Washington fir lumber for all inside work." (Tr. p. 215.) The Boggs contract made no mention of lumber, but the specifications called for *pine* lumber throughout, and made no mention of *Washington fir*. (Tr. p. 82-87.)

The Owen contract provided that the contractor should commence work within a reasonable time after notification of approval of the contract. (Tr. p. 216.) The Boggs contract contained no such provision.

The Owen contract required completion of the work within 240 days after said *notification*. (Tr. p. 216.) The Boggs contract required completion by a day certain, to-wit, September 1, 1905, 189 days after the date of the *contract*. (Tr. p. 64.)

By the Owen contract time was made of the essence. (Tr. p. 218.) The Boggs contract contained no such provision.

The Owen contract provided that the payment by the contractor of \$20.00 per day for delay might be waived in whole or in part. (Tr. p. 220.) The Boggs contract contained no such provision.

The Boggs contract provided that no claim should be made by the contractor or allowed for damages arising out of any delay caused by the Government. (Tr. p. 65.) The Owen contract contained no such provision.

The Boggs contract permitted an allowance of time to the contractor for delay *only* in case the delay occurred *through the fault of the Government*. (Tr. p. 64.) The Owen contract permitted an allowance of time to the contractor in case of delay occasioned by *strikes, epidemics, local or state quarantine restrictions, and abnormal force or violence of the elements*. (Tr. p. 219.)

The allowance of time provided in the Boggs contract was one day for each day's delay, and no more. (Tr. p. 64.) The Owen contract authorized the allowance of such additional time as might be "just and reasonable." (Tr. p. 219.)

The Boggs contract provided that the 20% of the contract price reserved until completion and acceptance should be forfeited in case of non-fulfillment of the contract. (Tr. p. 68.) The Owen contract contained no such provision. (Tr. p. 222.)

It will thus be seen that the terms of the two contracts differed materially. We will now examine the plans and specifications, and show that the two buildings were materially different, and that the second contract specified work not included at all in the first.

The Boggs plans, at one end of the mess-hall, called for an employees' mess-hall, 18 ft. x. 22 ft. This room was left out of the Owens plans. (Tr. p. 262.)

The Boggs plans called for a china closet, 14 ft. x 18 ft., adjoining the employees' mess-hall, just mentioned. This room was also left out of the Owens plans. (Tr. p. 262.)

The changes involved leaving out, in the Owen construction, a wall across the mess-hall, and a partition wall between the two omitted rooms, also a fireplace between the main mess-hall and the omitted employees' mess-hall, and a fireplace between the omitted employees' mess-hall and the omitted china closet, also the chimney at that point. The whole of the front of the building was planned, under the Owen contract, as a long mess-hall without any partition and without any fireplaces. (Tr. p. 262.)

The Boggs plans called for a fireplace at the other end of the mess-hall. This was omitted in the Owen plans. (Tr. p. 262.)

The Boggs plans called for a corridor 8 ft. x. 40 ft. 4 in. at the rear of the mess-hall. This was omitted in the Owen plans. (Tr. p. 263.)

The Boggs plans called for a kitchen and an employees' kitchen in the rear of the corridor just mentioned. These kitchens were omitted in the Owen plans. (Tr. p. 263.)

The Boggs plans called for a partition wall between the corridor and the two kitchens, and another partition wall between the two kitchens, with a place for the stove and three flues. These were all omitted in the Owen plans. (Tr. p. 263.)

The Boggs plans called for a refrigerator 15 ft. 3 in. x 14 ft. The Owen plan specified a refrigerator only 4 ft. x 10 ft. (Tr. p. 263.)

In place of the corridor 8 ft. x 40 ft. 4 in., specified in the Boggs plans, the Owen plans called for a china closet 12 ft. x 14 ft., a store-room 14 ft. x 17 ft., a lobby 14 ft. 6 in. x 10 ft., with a jog reducing it to 6 ft. at one end, and a refrigerator 4 ft. x 10 ft. (Tr. p. 263.)

On the Owen plans the kitchen adjoins the china closet, the storeroom and the lobby just mentioned, and opens directly into the mess-hall, in place of two kitchens separated from the mess-hall by a corridor, without any china closet, store-room or lobby, as in the Boggs plans. (Tr. p. 263.)

"That part of the building was all rearranged" in Owen's construction from what it was in Boggs'. (Tr. p. 264.)

The Boggs plans specified one pantry 5 ft. x 6 ft. The Owens plans called for two, 8 ft. x 10 ft. 9 in., with a partition wall not in Boggs' building. (Tr. p. 264.)

In Boggs' plan there are a drying-room, laundry, bakery, and ironing room; in Owen's, covering the corresponding space, an employees' mess-hall, employees' kitchen, and bakery, without any laundry or drying-room. No laundry, drying-room or ironing-room was constructed by Owen at all. The only room which remained identical in character in the rear part of the building was the bakery. (Tr. p. 264.)

In the Owen construction the laundry and drying-room space is all one room, and the omission of the partition wall there necessitated strengthening the roof and putting in girders and triple ceiling joists. (Tr. pp. 264-5.)

Wash tubs, included in the Boggs plan, were omitted in the Owen plan. (Tr. p. 265.)

Three ventilators were specified for Boggs, only one for Owen. (Tr. p. 265.)

In Boggs' plan, in the ironing room and bakery, appear two ceiling ventilators; Owen's plan shows four ceiling registers. (Tr. p. 265.)

Boggs' plan provides for no concrete hearth; Owen's does. (Tr. p. 265.)

The dough trough and kneading table shown in Boggs' plans are omitted in Owen's. (Tr. p. 265.)

In Owen's plans appear triple ceiling joists, 4 x 8 purlins and posts supporting the roof. None are shown in Boggs' plans. (Tr. p. 265.)

The iron rod half way up the chimney on one end of the building, shown on Boggs' plans, is absent on Owen's. (Tr. p. 265.)

At the other end of the building appears a chimney on Owen's plan, which does not appear at all on Boggs'. (Tr. p. 265.)

Differences appear in the front arrangement for the windows. Owen's plan called for 8 swinging sash, Boggs' for 3 windows. (Tr. p. 265.)

Owen's plans called for white stone for the foundation. There is no such specification on Boggs' plans. (Tr. p. 266.)

On the side elevation, Owen's plans required 6 roof ventilators, Boggs' three. (Tr. p. 266.)

There are changes in the arrangement of the windows on the side elevation. In Boggs' plan, the two windows at the side of the mess-hall are closer together than in Owen's, and

are differently placed; two windows in the center part are spaced differently. (Tr. p. 266.)

In the Boggs plan is an outlet from the corridor to the steps. This does not appear in the Owen plan, in place of which is a closed wall with a window in it. (Tr. p. 266.)

The outside windows and doors to the refrigerator room are different on the two plans, necessitated by the fact that in the Owen plans the refrigerator is very small and in the Boggs plans very large. (Tr. p. 266.)

In the rear elevation the roof ventilators are on a different side of the chimney in the two cases. (Tr. p. 266.)

In the rear elevation, white stone is specified in the Owen plan from the foundation to the roof, and malapai for the foundation. There is no such specification on Boggs' plan. (Tr. p. 266.)

In Owen's construction he was to take out and remove the old foundation altogether, and reconstruct it. Boggs, on the contrary, was to use the old foundation. (Tr. p. 267.)

Boggs' contract called for good hard red brick, but Owen would not stand for that, and told them he would use the best brick obtainable in that vicinity, and it was so agreed. There is no such limitation in Boggs' contract. (Tr. pp. 79, 215, 267.)

Boggs was to use stone for chimneys, and Owen "good local bricks for chimneys." "That is a difference between the two contracts." (Tr. pp. 215, 267.)

Instances of this kind might be multiplied by going through the specifications; but the labor would be unprofitable. By comparing the two sets of specifications (Tr. pp. 77, 234) it will be seen at a glance that every heading in one contains items differing from those in the corresponding heading in the other. Enough has been said to show that the two buildings were wholly unlike.

The Court found (Tr. p. 355), and the contractor Owen testified (Tr. pp. 261, 268-9) that \$1200 of his contract price applied to the foundations, work that Boggs had nothing whatever to do with, and that \$500 more of his contract price applied to other parts of the work additional to that included in the Boggs contract.

He himself said there were *two hundred items* of difference between the two buildings, a great many more than he had spoken of already, so many that it would take some time to enumerate them all. He testifies as follows (Tr. p. 270):

"In an interview between myself and Mr. Hopper after the last adjournment of Court at the Court House, I would not say if I said there were more than two hundred items of difference between the construction as planned under my contract and as planned under Mr. Boggs' contract, but I said there were a great many items of difference. I might have said there were two hundred, but I would not say positively I said two hundred. If I said two hundred there are probably two hundred there. I made the remark to Mr. Hopper at the same time that there were other differences to which my attention hadn't been called in cross-examination. As to telling offhand what the difference is in the two different buildings besides those I have already mentioned, why, I can't tell that unless I took the plans and go straight through and tell you item for item. I don't remember which ones I referred to. There are so many little variations that it is hard to tell without the plans and specifications. Why, it would take some time if you want them all. There are a great many more than those I have spoken of already. A great many more items. Some in one plan and some in the other. *I should say they prevail all through the construction.*"

The learned trial Court, at the close of the case, said (Tr. p. 337):

"I cannot agree with Mr. Horton on the Government's contention that they can let another contract that *differs in two hundred items of details* from the Boggs contract

more than a year after the Boggs contract had been declared forfeited and then force that or accept that as a measure of the damages. I can't agree to that at all.
 * * * It would not subserve any useful purpose to inquire into the reasons of that, but I mention it to show that *it was a different contract from the Boggs contract.*
 * * * Here is \$500 which he says himself is the difference between the contracts, and *two hundred items.*"

If the Government thus, instead of building the structure which Boggs had contracted for, and proceeding with his contract through another contractor, chose to change its mind about the building, concluded that the first one was not what it wanted anyway, and decided to erect something else which suited it better, it did so at the expense of releasing the surety on the old and abandoned contract. That such is the effect of the Government's action is abundantly established.

This Court has established it in a case identical with the case at bar.

In *United States vs. Axman*, decided May 25th, 1914, and reported in *United States Supreme Court Advance Opinions*, July 1st, 1914, Number 15, at pages 736 to 739; in 58 Law Ed. of U. S. Supreme Court Reports at page 1198; and in 234 U. S., at page 36, a dredging contract with the Government contained provisions substantially the same as those in the Boggs contract, giving the Government the right on the contractor's default, to annul the contract, take possession and complete the work at the contractor's expense.

The learned Solicitor General of the United States and United States Attorney associated with him in this case, realizing that it is incumbent upon them to attempt either to induce this Court to reverse itself, or to distinguish, if possible, the *Axman* case from the case at bar, print in their brief at pages 6 and 7 thereof, in parallel columns certain extracts from the *Axman* and *Boggs* contracts for the purpose of showing a supposed difference. They have fallen into the error,

however, of omitting an essential part of the Axman contract; probably because they took their excerpt from page 915 of 167 Fed. Rep., as their brief shows. We have examined the transcript of record in this Court, being No. 242, October Term, 1913, wherein the Axman contract and specifications are set forth at pages 73 to 87.

By comparing the two contracts it will be seen that they are substantially the same so far as the stipulated measure of damages for breach on the part of the contractor is concerned.

Article 4 of the Axman contract (Record No. 242, October Term, 1913, page 85) provides that in the event of default on the part of Axman the Government

"shall have power * * * to annul this contract by giving notice in writing to that effect * * * and upon the giving of such notice all payments * * * under this contract shall cease and all money or reserve percentage due, or to become due, the said party of the second part by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done, and the United States shall have the right to recover from the party of the second part *whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by said United States in excess of those payable by the said United States during the period herein allowed for the completion of the contract by the party of the second part.*"

Article 4 of the Boggs contract provides that in the event of default on the part of Boggs the Government

"is authorized and empowered, after eight days' notice thereof in writing, to the party of the second part, and the said party of the second part having failed to take such action within the said eight days as will, in the judgment of the party of the first part, remedy the default for which said notice was given, to take posses-

sion of the said work in whole or in part, * * * and, at the expense of said party of the second part, to complete or have completed the said work; * * * in which event the said party of the second part and his sureties of the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this contract."

These contracts merely express as the rule for ascertaining the damages to which the Government shall be entitled in the event of default on the part of the contractors, the familiar one which has become known as the rule of *Hadley vs. Baxendale*, 9 Excheq. 341, namely, that the damages recoverable by the injured party to a contract broken by the other party shall be such as may fairly and reasonably be considered as either arising naturally, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. The probable result of the breach by the builder of a building contract and bond guaranteeing the builder's performance thereof, is the cost to the owner of completing or procuring the completion of the very same work, plus, in the case of a Government contract, the cost of supervision and inspection throughout the extended period of construction. Both the Axman and the Boggs contracts express this as the rule or measure of damages, the Axman contract by expressly mentioning both sources of reasonably presumable loss or damage, and the Boggs contract by expressly mentioning the principal one and covering the other, *i. e.*, cost of supervision and inspection, by the words "any damages".

If the Government had desired at the time its officers drew the Boggs contract, to provide the unusual and extraordinary, to say the least of it, measure of damages now contended for by its attorneys, such provision could have been made by a plain statement to the effect that if at any time "*in the judg-*

ment of the party of the first part" it concluded that the contractor was in default or likely to become so, it should have the power, upon written notice to annul the contract and demand and require the repayment to it of all of the progress payments theretofore made upon the certificates of its officers. Of course no sane contractor or solvent surety would ever sign or guarantee a contract containing such a provision, and this is sufficient reason for the officers of the Government preferring to use language in the contracts which they prepare, which, when fairly and reasonably construed, means no more than that in the event of breach by the contractor the Government is to have the right to employ some other contractor, or its own engineers, to do the same work or complete the same, and if, in doing so, the Government is obliged to expend more money than it would have expended if there had been no default, then it is to be reimbursed by the defaulting contractor or his surety, not only for the actual excess cost of construction but also for the actual excess of cost of superintendence and inspection.

There can be no doubt but the Government would have this right under the law without providing for any measure of damages in these contracts, for the law reads into all contracts of this kind such rule or measure. But when the Government or any other contracting party desires to place itself in position to recover by virtue of some other, different and greater measure of damages than such as provides for those that arise naturally, or may reasonably be supposed to have been in the contemplation of *both parties*, it is incumbent upon it to make its desire so plain that the other party will necessarily be aware of it when he consents to be bound. And this is particularly so in a case like the present one, where the contract and bond were prepared by the officers of the Government. Can it be fairly said that a surety for a Government contractor is reasonably supposed to have contemplated that "if the said party of the second part shall fail to complete the work herein contracted for, or any part thereof

* * * within the time herein provided for, or shall fail to prosecute said work with such diligence as in the judgment of the party of the first part will insure the completion of the said work within the time hereinbefore provided for" (Tr. p. 66) then the surety would be liable to pay back to the Government any or all of the progress payments theretofore made by the Government for work and materials in place, certified, *upon honor*, by the officers of the Government charged by the contract with the supervision and inspection of the work?

The learned attorneys who represent the Government fail to refer to a single case which establishes any such liability upon the part of either contractor or surety. Their argument is that the words "any damages" in Article 4 of the Boggs contract impose such liability, but it is obvious from the context that these words mean, and were intended to mean, no more than that the Government was to have the right to recover *all* that it might cost it "to complete or have completed the said work, and to supply or have supplied the labor, materials and tools of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part" (Tr. p. 66).

The measure of damages for the breach of a building contract is clearly expressed by Page on Contracts, Vol. 3, sec. 1587, as follows:

"If a contract to construct a building is broken by reason of the contractor's failure to complete it, the measure of damages is the cost of completing it less the contract price."

If any different measure of damages is contended for such measure must have been clearly brought to the knowledge of both parties when the contract was made. Unless a contract clearly informs both parties as to a different measure of damages than is contemplated by the rule of law awarding dam-

ages for the breach of such a contract, it seems too clear for argument that the only damages recoverable are those awarded by the ordinary rule of law in case of the breach of the particular contract.

As stated by Page on Contracts, Vol. 3, sec. 1580:

"If a party in default is not advised of a special course of circumstances, he is not liable for the damages which follow the breach by reason of such special course. If greater damages than would be indicated by the rules for estimating ordinary damages are in fact sustained, such additional damages cannot be recovered unless the special circumstances which made it reasonable to expect that the greater damages would naturally ensue, were at the time when the contract was made within the knowledge of both parties."

Citing *Lonergan vs. Waldo*, 179 Mass. 135.

Axman, it will be recalled, failed to prosecute his work faithfully, the Government annulled the contract and made a new contract with the North American Dredging Company. The place for depositing the spoil designated in the re-let contract differed from that named in the original contract. It was contended that this was an immaterial change. But this Court, affirming the Circuit Court of Appeals for the Ninth Circuit held otherwise. Changes, agreed on in writing, were permitted by the original contract. Of course, the change made by the re-let contract was not agreed to in writing by Axman, any more than the numerous changes made in the case at bar were agreed to by Boggs. This Court held that the provision permitting changes availed the Government nothing. It was contended that the surety was not injured by the change in the place for dumping spoil, but on the contrary, was benefitted. This Court's answer to this argument is as follows:

"The real question in the case is whether the contract re-let for the completion of the work under paragraph 4 of the original contract was a contract for work

for which Axman was bound and which he failed to carry out, or whether it was a different contract, and therefore one for which Axman and his surety cannot be held, and which cannot be used for the measure of recovery for breach of the original contract. * * * We are clearly of the opinion in this case that the work done under the second contract was not the work which the first contractor had agreed to perform. While it is true it accomplished the dredging of the channel in the same bay, it did this with a disposition of the spoil not permitted under the first contract, and in a material matter was different from the contract first entered upon."

The opinion of the Circuit Court of Appeals for the Ninth Circuit in the Axman case is reported under the name of American Bonding Company vs. United States, 167 Fed. 910, and that Court said on page 917:

"But the Plaintiff in Error objects that it did not guarantee the contract with the North American Dredging Company under any conditions; that its guarantee was that Axman would perform the conditions of his contract, and that in case of failure its liability extended to the completion of the Axman contract and doing the work left undone; but it did not agree to become liable for any other contract, or for doing any work other than that left undone by Axman under his contract."

And again, on page 921:

"The surety has the right to stand upon the very terms of his contract. If the conditions of the liability have not accrued under the terms of the contract, the surety is not liable, and if a change is made in the contract without his consent his liability for it shall end, even though it may appear that the change is for his benefit. * * * In the present case there was a substantial change in the work required to be done under the original contract. The North American Dredging Co. did not, under its contract, complete the Axman

contract, and did not do the work he left undone. The surety did not consent to this change, and is, therefore, not liable for the additional cost arising out of the contract for work done in lieu of that provided for in the Axman contract."

In other words, the Circuit Court of Appeals held, and, as we understand it, this Court approved such holding, that as the changed conditions, caused by the act of the plaintiff, had rendered it impossible for the damages to be measured, either legally or equitable, the surety was, therefore, exonerated.

A decision more conclusive of the case at bar upon facts more nearly identical, cannot be conceived. We might safely rest our whole case upon this single decision.

The authorities are exhaustively examined in the opinion handed down by the Circuit Court of Appeals in the case cited, but we shall call the Court's attention also to a case very much in point, and not referred to either by the Circuit Court of Appeals or by this Court in the Axman case.

In *Chesapeake Transit Company vs. Walker & Son*, 158 Fed. 850, certain railroad contractors, "having failed to carry out the contract, and the road having thereupon been built and equipped by *another contractor*, at a higher price, the surety is now called upon by the company to make good the loss that is said to have been sustained."

The surety contended "that the agreement under which the road was afterwards constructed differed so materially from the first agreement that the surety was relieved from liability upon his bond."

After referring to the rule that a change in the original contract releases the surety, and citing *Shelton vs. American Surety Company*, 131 Fed. 210, which has been mentioned in this brief on that point, the Court holds that the same rule applies when a changed contract is made with a new contractor after breach by the old.

The Court said:

"While the present suit does not arise in precisely this way, the situation is so closely analogous that *the legal principles just referred to are still pertinent*. The defendant here agreed as surety that a certain contract should be carried out as a whole by his principals; there was a complete failure to fulfil on the part of his principals, and, by their default, the surety became immediately bound to make good whatever damage the other contracting party might suffer in an effort to have this particular engagement carried out as a whole by other persons. But, concededly, the first agreement, to which alone the engagement of the surety referred, was neither undertaken nor actually fulfilled by the second contractor. A new agreement was entered into, differing in many particulars from the first; and *manifestly, therefore, the surety cannot be affected by what was done under the second contract*, to which he did not agree, unless the differences between the two agreements are differences in details merely, and do not go so far as to make material and substantial changes. In order to determine how much, and how importantly, the second contract differs from the first, it will be necessary to examine both, and then to decide whether the differences that undoubtedly exist may be neglected as immaterial, or whether they are so great that the defendant has thereby been relieved from his obligation. He did not bind himself separately to the performance of each item among the number that are comprised in the agreement, but he promised that the whole engagement of his principals—although it was made up of many items—should be carried out; and therefore *he cannot be affected by the execution and performance of another contract that is materially different as a whole from the agreement to which his obligation refers*. Slight differences may not relieve him, but if, separately or in the aggregate, the changes are material, he cannot be bound by the action of other persons to which he did not consent."

The Court further said (page 857) :

"There are many other provisions in the second contract that do not appear in the first, and some of them are much more than mere matters of detail, as a careful reading will disclose; but I do not think it necessary to lay stress upon any other differences than those already specified, for, in my opinion, these are so marked and so material that the two agreements cannot be properly said to be substantially identical. One road was to be built and equipped as a steam road, the other as a road to be operated by both steam and electricity; the specifications of the first contract (so far as they may be divined from the estimate of Mr. Gleaves) differed in many and important respects from the specifications of the second contract; *the time allowed for completing the work differs by a month; and finally, the method and means of payment differ so much in their terms as to be hard to compare with accuracy. Clearly, all these differences must have had their influence upon the respective bids of Walker & Son, and of the National Construction Company, and, in my opinion, the changes that appear in the second contract are so numerous and so vital as to forbid the conclusion that the two agreements differ only in unimportant particulars. I believe them to be distinct contracts, differing so much in scope and in terms that the second contract cannot be held to be an immaterial variation from the first; and I therefore hold that the liability of the surety upon the first agreement has been discharged, because it cannot be measured, either legally or equitably, by what was done under the second.*"

In *United States vs. Freel* (Ct. Ct.) 92 Fed. 299; (C. C. A.) 99 Fed. 237; (Sup. Ct.) 186 U. S. 309, 46 L. Ed. 1177, the surety was three times held released by a change made by the Government of 64 feet in the location of the dry dock originally contracted for. And this was held, although the original contract (section 7) allowed changes to be made, and provided "that no change herein provided for shall in any manner affect the validity of the contract."

This Court, in that case, said (46 L. Ed. 1181):

"Coming, then, to the question of the effect on the responsibility of the surety of the supplemental agreement of August 17, we agree with the Circuit Court and the Circuit Court of Appeals in holding that the alterations thereby caused were beyond the terms of the undertaking of the surety, and extinguished his liability. The seventh section had in view such changes as might be found advantageous or necessary in the plans and specifications. But the changes called for by the new agreement *had no reference to the original plans and specifications*, but changed the location of the dry dock, requiring the contractor to make *additional excavations and connections with the water, at an increased expense, and gave an increased time of performance.*"

In *Alcatraz Asso. vs. U. S. Fidelity & G. Co.*, 3 Cal. App. 338, the Court said (pp. 341-2):

"The alteration of the contract as set forth in the complaint had the effect to release the surety from its contract of indemnity. * * *

"In this State the Legislature has declared in section 2819, Civil Code, that if by any act of the creditor without his consent the original obligation of the principal is altered in any respect he is exonerated. That the alterations in the contract agreed upon between the plaintiff and Grant had the effect to alter the obligation of the surety is apparent. A greater length of time was thereby required within which to finish the building, and a greater amount of labor and of expenditure incident thereto than that for which the defendant had agreed to indemnify the plaintiff. Because of these alterations the defendant ceased to be liable on its contract."

VII.

No measure of damage is shown, none can be shown, and no recovery is possible.

This point is involved in the last one, and may perhaps be regarded as the same, differently stated.

As in the case of *United States vs. Axman*, 234 U. S. 36, decisive of the last point, the contract in the present case set forth explicitly what rights the Government should have on the contractor's default. The Government was thereby given the right in such event, after notice, to take possession of the work, and at the expense of the contractor to complete the same, or have it completed, and to supply or have supplied the labor, materials and tools necessary to be purchased or supplied by reason of the contractor's default, "*in which event,*" and in no other, the surety was to be liable for all damages. (Tr. p. 66.)

The specifications defined the Government's rights, more briefly, in the same way, by providing that in the event of the contractor's failure to remedy any defective work, after notice, "the same will be remedied at the cost of the contractor." (Tr. p. 75.)

Under these provisions, and under the law, the only available measure of damages was the excess cost of *completing* or *remedying* the same work *originally* specified, and the excess cost of inspection.

This identical question, upon a contract containing substantially the same provisions, and upon substantially the same facts, was settled by this Court in the case already cited.

United States vs. Axman, supra.

To the same general effect are the following cases:

- American Surety Co. vs. Woods, 105 Fed. 741;
- American Bonding & Trust Co. vs. Gibson Co.,
127 Fed. 671;
- United States vs. Freel, 186 U. S. 309;
- Miller vs. Stewart, 9 Wheat. 680;
- Reese vs. United States, 9 Wall. 13;
- U. S. vs. Stone, Sand & Gravel Co. (C. C. A.),
177 Fed. 321;
- Chesapeake Transit Co. vs. Walker & Son, 158
Fed. 850.

In the present case, the liability accrued under the terms of the contract only when the Government should have taken possession of the *Boggs* work, and completed *that* work. The *Boggs* work never has been completed, and never can be. The means of measuring the damage are forever gone, and the liability can never accrue.

Even without the contractual limitations defining in this case the measure and process of recovery, the measure would be the excess cost of *completing the same work*.

In *United States vs. Grosjean*, 184 Fed. 593, a Government contractor defaulted, and the Government let the work anew; *but* the two contracts were the *same*, except in price, and the original work was but completed under the second. The Court said, in holding the surety liable:

"As the proof showed that the two contracts were, in respect to the point involved, *precisely similar*, and that the second contract was for a reasonable amount, and that the material furnished and work performed under the second contract was *precisely similar to that required by the first*, and that the government was compelled to pay and did pay to the second contractor \$900, it is plain, upon its showing that the government was entitled to judgment for the sum demanded by it, and costs."

VIII.

Retention by the government of the contractor's materials for more than a year, and surrender of them to the new contractor at less than half price, released the surety.

The value of these materials, at the time they were confiscated, was \$2,418.58. (Findings, Tr. p. 351.) Perkins himself, on January 2, 1906, writes to the Commissioner, stating that "the material is worth several thousand dollars." (Tr. p. 325.) It was confiscated by the Government on December 29, 1905, and was allowed to remain lying on the ground during the whole of the year 1906, and the early part of the year 1907. When Owen, the new contractor, arrived on the scene, some time after January 22, 1907, "the materials were lying on the ground near there." It does not appear that they had even been protected from the weather.

"It was piled back further away from the building, 150 or 200 feet or something like that, if I remember right." (Owen, Tr. p. 268.)

After January 22, 1907, the Government surrendered these materials to Owen for \$1,162.98, less than half their value. (Tr. p. 261.) At that time the market value of building materials was higher than it had been in 1905 (Owen, Tr. pp. 261-2), and the materials, if properly cared for and protected, should have been worth then more than \$2,418.58. They were not perishable, nor apt to depreciate with time, under reasonable protection. They consisted of hardware, nails, truss rods, building paper, stone, sand, lime, lumber and shingles. (Perkins, Tr. p. 325.)

The Government held this property of the contractor as a security of which the surety was entitled to the benefit. It was bound to see that the security was not lost to the surety.

to realize its reasonable value, and to credit it on the surety's liability. When *it voluntarily gave away more than half of this security for nothing*, it released the bond.

Montgomery vs. Sayre, 100 Cal. 182, 185:

"Sayre, then, being a surety, he was exonerated, if * * * Montgomery, having a judgment lien upon land of Chapman which, if sold at its real value, would have realized a sufficient amount of money to satisfy all indebtedness of the latter to the former, including said judgment, united with Chapman in selling and conveying said land at private sale to one Hughes for a price far less than its real value."

We refer the Court also to the cases cited under our first point, which are all to the effect that the surrender of a security to which the surety is entitled discharges the bond.

IX.

Government's failure to notify surety discharged the bond.

No notice of any kind was given the surety until January 16, 1906. It is not pretended that the surety had any knowledge of the dealings between the principals and the changes in the situation which had been taking place. And the burden was of course on the Government to show the surety's consent or knowledge, if any was claimed.

U. S. vs. Freeland, 186 U. S. 309, 46 L. Ed. 1177, 1182;

U. S. vs. McIntyre, 111 Fed. 590, 597;

Mundy vs. Stevens, 61 Fed. 77, 85;

Tuohy vs. Woods, 122 Cal. 665, 667;

Alcatraz Asso. vs. U. S. Fidelity & G. Co., 3 Cal. App. 338, 342.

"The government in its business transactions is bound to deal fairly, and where the facts of a transaction to which the Government is a party would raise an implied obligation in a similar transaction between private individuals, the Government becomes obligated, the same as an individual."

Moses vs. U. S., 116 Fed. 526, 529;

U. S. vs. Smith, 94 U. S. 214, 24 L. Ed. 115;

Clark vs. U. S., 6 Wall. 543, 18 L. Ed. 916.

The Government was required to refrain from doing anything which might prejudice the surety without giving the latter an opportunity to protect itself. After the former had certified in writing that the work was satisfactory and had paid for it, the surety was not advised that it had rejected the same work, and was given no opportunity to protect itself in any way. When the Government refused to take possession and complete the work itself as its contract notified the surety it would do, but on the contrary gave up possession to the contractor and directed him to go on with the work, the surety was still kept in the dark. When the building burned, as an incident to the contractor's possession, nothing was said about it to the surety. When the officials at Washington, early in December, began to contemplate stopping the work, they directed Perkins "not to commit the Government in any way," and their intention was deliberately concealed. When, more than a year later, a new contract was let, nothing was revealed about it to the surety. From beginning to end, the surety was totally disregarded, and was treated as if it had no concern in anything that was going on. The failure to notify it of any of these things increased the surety's risk, and deprived it of all opportunity to save itself. Certainly after the actual discovery of the contractor's unfaithfulness, the surety had a right to be notified thereof, before he was continued in the Government's service, and to elect whether it would continue to be bound.

Aetna Ins. Co. vs. Fowler, 66 N. W. 470;

Roberts vs. Donovan, 70 Cal. 108.

X.

**Contractor's offer to perform released the surety
under the California Civil Code.**

On August 14, 1905, before the building was finished, while the workmen were still on the ground, and a month before Boggs was notified of the rejection, he wrote to Kincaid, in charge of the work for him, to correct the defects complained of by Perkins. "His instructions then to me at that time was to do everything that I could to please the doctor." (Kincaid, Tr. p. 177.)

On August 28, 1905, before the building was rejected, and before the time for completion had expired, Boggs wrote to Perkins offering to make everything right. He said (Tr. p. 124):

"Let the Department send out their inspector, and whatever in his judgment is necessary to make the work as per plans and specifications I am willing to pay. If it is left to you, kindly get someone who is not prejudiced to go over the work with you and I assure you your decision will be acceptable to me."

On September 24, 1905, Boggs wrote Perkins (Tr. p. 155), saying:

"I am ready and willing to send men and materials and to do over any work necessary to satisfy you and the Department."

This offer was immediately telegraphed to the Commissioner by Perkins. (Tr. p. 316.)

On October 8, 1905 (Tr. p. 128), Boggs wrote Perkins; on October 17, 1905 (Tr. p. 126), he wrote to the Commissioner; on October 18, 1905 (Tr. p. 125), he wrote Perkins, making in effect the same offer. These offers were accepted and acted on. The surety was thereby released.

In *Daneri vs. Grazzola*, 139 Cal. 416, the debtor offered to perform, not only after the maturity of the obligation, but actually after suit was commenced against him and his sureties. This offer was held to release the sureties. The Court said:

"The tender or offer to pay the note by the principal released the sureties."

Cal. Civil Code, Sec. 2839:

"Performance of the principal obligation, or *an offer of such performance*, duly made as provided in this code, exonerates a surety."

The bond in question here is a California obligation, having been executed at San Francisco (Tr. p. 20); the principal was a resident of Riverside, California (Tr. p. 199), and this suit was brought in the Circuit Court for the Southern District of California. That the bond is to be treated as a California contract is conceded by the Plaintiff in Error in its brief at page 33 thereof. We take it there can be no doubt that the surety is entitled to avail itself of the California law on the point now urged, and on every other point in the case. All possibility of doubt on that subject is removed by the Act of Congress of August 13, 1894, Ch. 282, Sec. 5, 28 Stat. L. 279, as follows:

"That any surety company doing business under the provisions of this act may be sued in respect thereof in any court of the United States which has now or hereafter may have jurisdiction of actions or suits upon such recognizance, stipulation, bond, or undertaking, in the district in which such recognizance, stipulation, bond or undertaking was made or guaranteed, or in the district in which the principal office of such company is located, and for the purposes of this act such recognizance, stipulation, bond or undertaking shall be *treated as made* or guaranteed in the district in which the office is located, to which it is returnable, or in which it is filed, or in the district in which the principal in such recognizance, stipulation, bond or undertaking *resided when it was made or guaranteed*."

XI.

**The Government's claim for interest is
without merit.**

We urge this point upon four grounds:

1. The claim was unliquidated.
2. Interest was precluded by an offer of payment and performance on the part of the principal.
3. No demand was made on the surety prior to suit.
4. Plaintiff was guilty of laches in prosecuting its claim.

In a suit by a contractor for the value of labor and materials furnished by him under a contract, where the amount was not a mere matter of computation, but required to be ascertained by suit, and was moreover subject to a counterclaim, all of which conditions exist in the case at bar, it was held by the Circuit Court of Appeals for the Second Circuit that no interest should have been allowed.

Stephens vs. Bridge Co., 139 Fed. 248.

See also—

Krasilnikoff vs. Dundon, 8 Cal. App. 406, 411,
412.

In addition to the fact that the plaintiff's own claim was wholly unliquidated, in the case at bar, and was not a simple matter of computation, and to the fact that this suit was brought for a vastly greater sum than that found by the trial court, and upon a number of other items, it must be remembered that the claim was subject to a counterclaim, which depended upon a question of market value, and which was not only unliquidated itself, but which necessarily thereby rendered the chief claim unliquidated.

Cal. Civil Code, Sec. 1504:

"An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation and has the same effect upon all its incidents as a performance thereof."

As we have already seen, Boggs offered in writing, both before and after September 1, 1905, to pay and perform. It is held that this stops the running of interest; and in the present case interest, being allowed only from September 1, 1905 (Tr. p. 360), had already been stopped by the previous offer. We have also seen that the surety is beyond question entitled to avail itself of the California law in this case.

Wadleigh vs. Phelps, 149 Cal. 627, 642;

Ferrea vs. Tubbs, 125 Cal. 587, 690.

No demand was made on the surety prior to bringing suit. None was made even by the letter of January 16, 1906. (Tr. p. 332.) Certainly in no event could interest be allowed prior to the commencement of the action.

U. S. vs. Quinn (C. C. A.), 122 Fed. 65.

Although the last amount found by the trial court to be due was paid the contractor not later than July, 1905, the Government did nothing towards pressing its claim for the same during the years 1905, 1906 or 1907. Only in March, 1908, was suit filed. This delay of nearly three years is totally unexplained. This Court has held that interest should be withheld when the plaintiff "has been guilty of laches in unreasonably delaying the prosecution of its claim," and that

"the same rule should be applied against the Government when in a case like the present one it has long delayed an assertion of its rights, without showing some

reason or excuse for the delay, especially when it does not appear that the defendant has earned interest upon the money improperly received by him."

U. S. vs. Sanborn, 135 U. S. 271, 34 L. Ed. 112, 115;

Redfield vs. Iron Co., 110 U. S. 174, 28 L. Ed. 109;

Redfield vs. Bartels, 139 U. S. 694, 35 L. Ed. 310, 313.

The plaintiff is not entitled, by its own procrastination, thus to convert its simple claim into a 7% investment for a term of years. If the surety is obliged to pay, it is entitled to know it at a reasonably early date, so far as the plaintiff itself has control; and the latter is not to be permitted, simply by lying back at its ease, to penalize the surety in a heavy interest charge which would otherwise have been avoided.

XII.

The Sureties' defenses were properly pleaded.

A suggestion is made in the brief filed on behalf of the United States that the answer does not sufficiently set up our defenses. To this objection, we make the following three-fold reply, based on the pleadings, the proceedings at the trial, and the findings:

(a) The complaint sets up all the facts in detail on which we base our defenses, and those facts are all put in issue by the answer. The defenses are mere matters of law flowing from the facts alleged and denied by the pleadings. It was not only unnecessary, but it would have been improper, to set forth those conclusions of law in the answer. This would have been but to turn the answer into an argument, and to

substitute a brief for a pleading. The burden was on plaintiff to show that it had a cause of action and was entitled to a particular sum of money, and as a part thereof to show that it had complied with its contract with Boggs; this burden its counsel recognized, and they accordingly set forth fully and in detail all the transactions from which our defenses arise.

The complaint alleges the two progress payments made to the contractor, and alleges that they were made "*in accordance with the terms of said contract,*" and "*pursuant to the terms of said contract.*" (Tr. p. 14.) This is denied by the answer. (Tr. p. 28.) This raises the question whether the payments made were authorized by the contract, the question discussed in Points I, II and III of this brief.

The complaint alleges that after September 1, 1905, the property was permitted to remain in the contractor's possession, during which possession, on November 4, 1905, it was destroyed by fire. (Tr. p. 15.) This is denied by the answer. (Tr. p. 29.) This raises the question discussed in Point IV of this brief.

The complaint alleges the seizure of the premises by the government on December 28, 1905. (Tr. pp. 15-16.) This is denied. (Tr. p. 30.) This raises the question discussed in Point V of this brief, relating to the release of the surety by such prevention.

The complaint alleges the making of the new contract with Owen, and alleges that contract to have been "*for the construction of said stone mess-hall and kitchen at said Rice Station Indian school in all respects as required by said contract with the said Augustus W. Boggs,*" and that Owen's price of \$16,600.00 was required to be paid "*for the purpose of securing the completion of the said work agreed by said Augustus W. Boggs, under and by the terms of said contract with him hereinabove referred to, to be by him completed as aforesaid,*" and "*in all respects as required by said contract*

with said defendant *Augustus W. Boggs*"; and that the plaintiff was required to pay the difference between \$12,709.00 and \$16,600.00, the two contract prices, "for the completion of said work as aforesaid." (Tr. pp. 16, 17, 18.) All this is denied. (Tr. p. 30.) This raises the questions discussed in Points VI and VII of this brief, relating to the release effected by the new and different contract, and the preclusion of a recovery measured thereby.

The complaint alleges damage in "the amount paid by said plaintiff to said defendant *Augustus W. Boggs* in accordance with said contract as hereinbefore alleged." (Tr. p. 18.) This is denied. (Tr. p. 31.) This again raises the questions discussed in Points I, II and III of this brief, and also raises the question as to the true measure of damages, discussed in Point VII.

The amended answer alleges the seizure of the premises and prevention of the work by the Government on December 28, 1905 (Tr. p. 36), and thereby raised again the question discussed in Point V of this brief.

In *United States vs. Freel*, 186 U. S. 309, 46 L. Ed. 1177, 1182, which involved a question of *pleading* only, raised by *demurrer*, the Supreme Court said:

"A further contention is made in the Government's brief that, even if such substantial changes were made in the contract as would release the surety if made without his assent, the fact of such changes should have been set up by the defendant as an affirmative defense by answer or plea, and not by demurrer. * * *

"If upon the face of the agreement of August 17, 1893, it appeared that substantial changes were made in the location of the proposed structure, requiring additional excavations and connections at an increased expense, and extending the time limited by the contract for the completion of the dry dock for a period of eight weeks, on account of the change in the position of the dry dock, and if, as is conceded by this objection, such substantial changes in the location, cost and time neces-

sary for the completion of the work operated to release the surety if made without his knowledge and consent, then the declaration put the plaintiff out of court, so far as the defendant surety was concerned, unless it was averred that the latter had knowledge of the changes and consented thereto. If the Government's pleader had knowledge of facts showing such knowledge and consent, and was surprised by the action of the trial judge in sustaining the demurrer, it was open to him to ask leave to amend the declaration by adding the necessary amendment. This was not done, and we think it is too late to urge this objection in this court."

In *Chesapeake Transit Co. vs. Mott*, 169 Fed. 543, 545, affirming *Chesapeake Transit Co. vs. Walker & Son*, 158 Fed. 850, the Circuit Court of Appeals held, on the question of a failure of proof regarding the cost of completion:

"The burden rested on the *plaintiff* to furnish such proofs as warranted a verdict in its favor."

The defendant's objection that plaintiff has not alleged or established facts warranting a recovery may be made at any time, even on appeal for the first time, and without demurrer.

Flood vs. Templeton, 148 Cal. 374;

Burke vs. Maguire, 154 Cal. 456.

No new matter is involved in the legal defenses urged by the surety in this case. They result from the very transactions set up by the complaint itself. They do not rely upon facts arising *since* those transactions, but upon those very transactions themselves. They do not seek to avoid a cause of action which they admit once existed—they contend that a cause of action never existed. They do not plead a subsequent release of a once existing claim—they urge that no claim ever accrued at all. They do not set up anything in abatement, but go to the merits of the action and show

that the cause of action did not exist, on the very facts on which plaintiff itself depended.

In *Landis vs. Morissey*, 69 Cal. 83, a suit for goods sold, where there was a mere general denial, evidence was held admissible showing that a credit had been given which had not expired at the commencement of suit. The Court said:

"What is new matter? New matter is that which admits that the cause of action stated in the complaint once existed, but at the same time avoids it,—that is, shows that it has ceased to exist. * * * It is matter arising subsequently to the origin of the cause of action. A plea of release admits the cause of action, but sets forth a release subsequently executed by the party authorized to release the cause of action. So also a plea of accord and satisfaction.

"But the matters here offered to be shown were not of those occurring after the cause of action arose. The defendant's offer was to show that the cause of action did not exist when the action was begun. The answer put in issue all the material allegations of the complaint. The offer was to prove that the cause of action had not accrued when the suit was brought. * * *

"Counsel are in error in assuming the offer of defendant could only be presented in a plea in abatement. It goes to the merits of the action and shows that it never existed when the suit was brought. It is an answer to the whole action and a perfect defense. Such a defense can be made without any plea in abatement. It does not merely abate the action: it defeats it."

In *Bridges vs. Paige*, 13 Cal. 640, the Court said:

"Anything which shows that the plaintiff has not the right of recovery at all, or to the extent he claims, on the case as he makes it, may be given in evidence upon an issue joined by an allegation in the complaint, and its denial in the answer."

In *Frank vs. Pennie*, 117 Cal. 254, on a defense that the alleged claim was for a gambling debt, the Court said:

"It was permissible to introduce evidence of the *nature of the transaction* between the parties under the general issue."

In *Brooks vs. Ardizzone*, 9 Cal. App. 215, the Court said:

"While no plea of payment is presented by the answer, the right to prove the same exists in this State where the general issue is tendered."

"Although in point of *form* the plea of *non assumpsit* puts nothing in issue but the making of the promise, it has been long settled that nearly every defense is admissible under that plea which *shows that there was not a substantial cause of action at the time the suit was brought.*"

Heaton vs. Arper, 145 Cal. 282, 284;

Meredith vs. S. Clara M. Asso., 56 Cal. 183.

b. At the trial, all of the matters now relied on in defense were treated as in issue. The evidence from which the defenses as matters of law arise was introduced by the *plaintiff*, in establishing the facts alleged by its complaint and denied by the answer. No objection was made to any evidence offered by defendant on the ground of defect in the pleading. Indeed, the trial Court was of the opinion that we might have proved even our counter-claim under the general issue. (Tr. p. 165.) No *new* facts were developed by either side, additional to those alleged and denied in the pleadings. The Court admitted all the evidence offered on both sides. The legal points urged in our brief were argued by both sides at the trial, and were passed on by the Court. Under these circumstances, an objection on the score of pleadings cannot be made for the first time in this Court.

The plaintiff's testimony is found at pages 62-284 of the transcript, the defendant's at pages 284-333. We ask the Court's particular attention to the fact that *all* the facts re-

lied on by the defense were opened up, entered into, and covered in great detail by the *plaintiff's* own testimony. Defendant called only four witnesses (Tr. pp. 284-314), and their testimony was confined strictly to the subjects brought out in plaintiff's evidence. Not a word of *new matter* is offered by any of them. Besides these four witnesses, defendant offered only a few letters which had been omitted from the mass of correspondence *introduced by plaintiff*. (Tr. pp. 314-333.) Can plaintiff be heard to object to the evidence *which it introduced itself*, or to any proper legal inference therefrom? So far from making any objection on the score of pleading, plaintiff actually put the evidence in itself. The Court let in all the evidence offered on both sides, reserving the right to make therefrom any legal conclusions that might be proper. (Tr. pp. 340-341.)

The opinion of the trial Court shows that the points we now urge were treated by both sides as in issue, were argued by both counsel and were passed on by the trial Court.

The question of the value of Boggs's materials, surrendered by the Government to the new contractor, was passed on by the Court. (Tr. p. 339.) This involved Point VIII in this brief.

The defenses are not now urged for the first time, but were treated as in issue at all times during the trial by counsel on both sides and by the Court.

Where estoppel is not pleaded, but the case is tried upon the theory that the plea is sufficiently made, the objection thereto cannot be urged for the first time on appeal.

Wiley vs. Bank, 141 Cal. 508, 518;

Hubbard vs. Lee, 6 Cal. App. 602, 609.

Where no answer at all is filed, but the case is tried as if an answer containing proper denials has been filed, the point cannot be first raised on appeal that there were no issues.

Sauer vs. Brewing Co., 3 Cal. App. 127, 131;

Gale vs. Water Co., 14 Cal. 26.

Where the issue is tendered by the objecting party himself, and the case is tried as if the issue has been properly made, the question cannot be made on appeal for the first time.

Krasky vs. Wollpert, 134 Cal. 338, 343.

Where trial is had upon an answer, on the theory that the defenses in question are thereby raised, and no objection is made to the evidence on the score of pleading, such objection will not be heard for the first time on appeal.

Sprigg vs. Barber, 122 Cal. 573, 579;

Kimball vs. Richardson, 111 Cal. 386, 397;

Tuffree vs. Polhemus, 108 Cal. 670, 676;

Loftus vs. Fischer, 106 Cal. 616, 618;

Klapper vs. Levy, 98 Cal. 525, 526;

Thomas vs. Black, 84 Cal. 221, 224;

Kirsch vs. Kirsch, 83 Cal. 633, 635;

Moore vs. Campbell, 72 Cal. 251, 253.

The above rule relates not only to denials, but "*extends to affirmative defenses as well.*"

Water Co. vs. Richardson, 72 Cal. 598, 600.

c. We call attention also to the fact that the findings themselves determine each of the points urged in defense. The findings have the same effect as the proceedings at the trial, and cure any defect in the pleadings, certainly when, as here, the facts found were in actual controversy at the trial, upon evidence admitted, as here, without objection founded upon the state of the pleadings.

Findings IX and XXIII pass upon the question discussed in points I, II and III of this brief. (Tr. pp. 47, 50, 51.)

Findings XVI, XVIII and XXIII pass upon the question discussed in point V of this brief. (Tr. pp. 48, 49, 51.)

Findings VIII, XVII and XIX pass upon the question discussed in point V of this brief. (Tr. pp. 46 and 49.)

Findings XXIII and XXIV pass upon the question discussed in points VI and VII of this brief (Tr. pp. 50-54.)

All the questions as to the discharge of the surety are generally passed on by finding XXIII (Tr. p. 52).

Conclusion

The judgment of the Circuit Court of Appeals for the Ninth Circuit should be affirmed.

Respectfully submitted,

J. KEMP BARTLETT,
*Attorney for United States Fidelity
and Guaranty Company.*

UNITED STATES *v.* UNITED STATES FIDELITY
& GUARANTY COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT.

No. 125. Argued January 15, 1915.—Decided February 23, 1915.

Under the terms of the contract involved in this case for a completed building on which partial payments were to be made as work progressed, but which was destroyed by fire during construction and never rebuilt by the contractor who had received several payments on account and who accepted notice of default and abandoned the contract, *held that*:

Where the Government relets a contract with substantial differences, the liability of the surety is not released from all obligation nor is his liability measured by the difference between the two contracts, but his liability is measured by the actual loss sustained by the Government, in this case represented by the partial payments made as work progressed and for which it received nothing in return.

The liability of the surety became fixed on occurrence of default and was not released by failure of the Government to have the same kind of a building erected in place of the one not delivered by the contractor.

The contractor's right under the contract to retain partial payments was conditioned on his subsequent fulfilment of the contract and when he wholly defaulted and gave nothing in return, he was obligated to repay the amounts received.

Under the contract in this case, the Government, while authorized to complete the work at the expense of the contractor, was not confined to that remedy, but could recover from the contractor or the surety the actual damages sustained.

The rule that a party suffering loss from breach of contract must do what a reasonable man would do to mitigate the loss does not apply where, as in this case, a fixed loss has been sustained that cannot be mitigated.

Under Rev. Stat., §§ 649, 700, and 1011 as amended by act of February 18, 1875, findings of fact have the same effect as the verdict of a jury, and this court does not revise them but merely determines whether they support the judgment.

Delay on the part of the Government in pressing its claim against a contractor who has accepted partial payments, knowing that he was not entitled thereto, does not amount to a waiver of interest.

An exception furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court.

The weight of authority in England is adverse to the recovery of interest from the surety in addition to the penalty of the bond, but that rule has not invariably been followed in this country.

A surety, if answerable at all for interest beyond the amount of the penalty of the bond, can only be held for such interest as accrues from unjustly withholding payment after notice of default of the principal. *United States v. Hills*, 4 Cliff. 618, approved.

194 Fed. Rep. 611, reversed.

THIS action was brought by the United States in the Circuit Court for the Southern District of California against Augustus W. Boggs and the United States Fidelity & Guaranty Company of Baltimore, Maryland (which may be called, for convenience, the "Guaranty Company"), to recover damages for the failure of Boggs to perform his contract to construct for plaintiff a stone

mess-hall and kitchen at the Rice Station Indian School in Arizona, for the performance of which the Guaranty Company was his surety upon a bond in the penal sum of \$6,500. Upon plaintiff's complaint and the answer of the Guaranty Company (Boggs having failed to appear and his default having been entered), the case came on for trial before the Circuit Court, trial by jury being formally waived under § 649, Rev. Stat. Elaborate findings of fact were made, the substance of which is as follows: By the contract, which was in writing and dated February 23, 1905, Boggs agreed to furnish all materials and perform all work required for the construction and completion of the building in strict and full accordance with the requirements of the plans and specifications which were annexed; covenanting that the entire work should be completed and turned over to the United States on or before September 1; and that (Article 4) if he failed to complete the work in accordance with the agreement within that time "the said party of the first part [the United States] may withhold all payments for work in place until final completion and acceptance of same, and is authorized and empowered, after eight days' notice thereof, in writing, to the party of the second part, and the said party of the second part having failed to take such action within the said eight days as will, in the judgment of the party of the first part, remedy the default for which said notice was given, to take possession of the said work in whole or in part and of all machinery and tools employed thereon and all materials belonging to the said party of the second part delivered on the site, and, at the expense of said party of the second part, to complete or have completed the said work, and to supply or have supplied the labor, materials, and tools of whatever character necessary to be purchased or supplied by reason of the default of the said party of the second part; in which event the said party of the second part and

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his sureties of the bond to be given for the faithful performance of this agreement shall be further liable for any damages incurred through such default and any and all other breaches of this contract." By Article 9 the United States agreed to pay to the contractor on the presentation of proper receipts or vouchers the sum of \$12,709, "in consideration of the herein recited covenants and agreements made by the party of the second part, as follows: Eighty (80) per centum of the value of the work executed and actually in place to the satisfaction of the party of the first part at the expiration of each thirty (30) days during the progress of the work, the amount of each payment to be computed upon the actual amount of labor and materials expended during the said period of thirty (30) days for which partial payment is to be made, (the said value to be ascertained by the party of the first part); and the balance thereof will be retained until the completion of the entire work, and the approval and acceptance of the same by the party of the first part, which amount shall be forfeited by the said party of the second part in the event of the non-fulfillment of this contract; it being expressly covenanted and agreed that said forfeiture shall not relieve the party of the second part from liability to the party of the first part for any and all damages sustained by reason of any breach of this contract." Attached to the contract as a part of the specifications were certain "general conditions" which (*inter alia*) required the contractor to be responsible for all damages to the building, whether from fire or other causes, during the prosecution of the work and until its acceptance, and declared that partial payments were not to be considered as an acceptance of any work or material. On or about April 12, Boggs commenced operations and furnished certain materials and did certain work, but he did not at any time complete the building in accordance with the contract, and on the contrary wilfully, intentionally, and

fraudulently disregarded the terms of the contract from the beginning of his operations under it. On June 10 plaintiff paid him \$4,356.24 on account, and on July 21 the further sum of \$3,539.16, both payments being "pursuant to the terms of said contract," and aggregating \$7,895.40, no part of which has been repaid to plaintiff. He not only failed to complete the work on or before the first of September, but failed after that date to take such action as would remedy his default. On or about October 27 plaintiff rejected the work and materials and the building as offered for acceptance by Boggs. On November 4, while the structure was still in his possession, it was completely destroyed by fire. Thereafter he did not in accordance with the provisions of the contract commence the construction or reconstruction of the building, and anything he did thereafter was outside of the contract and without plaintiff's consent. On or about December 28, by reason of his failure and refusal to perform the terms of the contract, or to complete and turn over the building as therein required, or to remedy his default, plaintiff took possession of the site, and notified Boggs and his representatives to vacate the premises and leave the Indian Reservation, which they immediately did. At the same time plaintiff seized and confiscated certain building materials, tools, and implements, of the value of \$2,418.58, then upon the premises and belonging to Boggs. It is further found that Boggs wilfully, intentionally, and fraudulently failed, neglected, and refused to erect a structure in accordance with the plans and specifications that were a part of his contract, although plaintiff performed all conditions and obligations on its part; and there are specific findings that plaintiff did not change or abrogate the terms of the contract in any particular, nor extend the time of performance, nor consent to the failure and delay on the part of Boggs. In December, 1906, the United States advertised for the construc-

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tion of a new mess-hall and kitchen upon the same site, and in January, 1907, entered into a written contract with one Owen for the construction of such building for the sum of \$16,600, in lieu of the building that had been agreed to be built by Boggs; but the contract with Owen was different in substantial respects from that made between the plaintiff and Boggs, and the building actually erected by Owen was likewise different; \$1,200 of the contract price agreed to be paid and actually paid to him had reference to work wholly outside of the work provided for in the Boggs contract, and \$500 of the contract price agreed to be paid and actually paid to Owen was for work and materials in excess of what was included in the Boggs contract. Moreover, the cost of labor and building supplies had materially increased between the time of Boggs' default and the time of making the new agreement. Hence, the trial court found that a comparison between the two contracts furnished no basis for estimating plaintiff's damages.

Upon these findings judgment was rendered in favor of the United States for the amount of the two sums advanced to Boggs during the progress of the work (\$7,895.40), from which, however, \$2,418.58 was deducted as a set-off and counter-claim in favor of defendants for the value of the materials confiscated. Interest was allowed to plaintiff at 7% upon the amount of the "progress payments" from September 1, 1905, until the date of judgment, and interest at the same rate was allowed to defendants upon the amount of the offset from December 28, 1905, the difference, which plaintiff was held entitled to recover, being \$7,403.09; but the recovery against the Guaranty Company was limited to \$6,500, besides costs.

Upon cross-writs of error this judgment was reviewed by the Circuit Court of Appeals, with the result that it was reversed for error assigned by the Guaranty Company, and the cause remanded with directions to enter

judgment in its favor on the findings. 194 Fed. Rep. 611. The present writ of error was then sued out.

The Solicitor General, with whom *Mr. W. C. Herron* was on the brief, for the United States:

The surety was not released by the changes in the relet contract, but was liable to the extent, at least, of the progress payments. *United States v. Axman*, 234 U. S. 36; *S. C., American Bonding Co. v. United States*, 167 Fed. Rep. 910, distinguished. As under the contract in that case the Government was limited in its recovery to such sum as was expended by it in completing the contract, and the decision went against it because of its failure to observe an express stipulation relating to the determination of damages.

In this case the contract expressly provided that both the contractor and the surety should be liable for any damages incurred through the default and any other breaches of the contract.

The doctrine that a surety is released by material changes made without his consent has no application to changes made in a relet contract after a default on the original.

Because of insolvency of contractor, the Government waives assignment of error relating to refusal of lower court to allow damages on amounts of excess cost in relet contract.

The Government was damaged to full amount of the progress payments, which it is entitled to recover.

The other defenses urged by the surety in the court below are without merit. They were not specially pleaded, and defense of release must be specially pleaded by the surety, and the burden of proof is upon him to establish such defense. *Randle v. Barnard*, 99 Fed. Rep. 348, 350; *Howard County v. Baker*, 119 Missouri, 397, 407; *Sachs v. Am. Surety Co.*, 72 N. Y. App. Div. 60, 66.

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The same rule obtains in California, where the case at bar was tried. Code Civ. Proc., 1907, § 437; *Piercy v. Sabin*, 10 California, 22, 27; *Bull v. Coe*, 77 California, 54, 62.

It is not anywhere pleaded or proved that the surety was damaged in any way.

While this was immaterial under the old law relating to the voluntary surety, the rule of *strictissimi juris* has been relaxed as to professional bonding companies. *Atlantic Trust Co. v. Laurinburg*, 163 Fed. Rep. 690, 695; *Hill v. Am. Surety Co.*, 200 U. S. 197, 202; *U. S. Fidelity Co. v. United States*, 178 Fed. Rep. 692.

None of these defenses of the surety has any merit.

The progress payments are governed by Article 9 of the contract, and the evidence shows a substantial compliance with the contract.

The claim of the surety that it was released because of the Government's failure properly to inspect the work during its progress is also without merit. *United States v. Kirkpatrick*, 9 Wheat. 720, 736; *Dox v. Postmaster General*, 1 Pet. 318, 325.

The United States is entitled to interest on the penalty of the bond from September 1, 1905, the date of default, or at least from January 16, 1906, when the surety was notified of such default. *Probate Judge v. Heydock*, 8 N. H. 491, 494; *Perit v. Wallis*, 2 Dall. 252; *United States v. Quinn*, 122 Fed. Rep. 65.

Mr. J. Kemp Bartlett for defendants in error:

The improper payment by the United States to the contractor released the surety. *Fidelity Co. v. Agnew*, 152 Fed. Rep. 955; *Shelton v. Am. Surety Co.*, 131 Fed. Rep. 210; *Shelton v. Am. Surety Co.*, 127 Fed. Rep. 736; *National Surety Co. v. Long*, 125 Fed. Rep. 887; *Commissioners v. Branham*, 57 Fed. Rep. 179; *Glenn County v. Jones*, 146 California, 518; *Kiessig v. Allspaugh*, 91

California, 231; *Bragg v. Shain*, 49 California, 131; *Queal v. Stradley*, 90 N. W. Rep. 588; *Electric Appliance Co. v. U. S. Fidelity Co.*, 85 N. W. Rep. 648; *Backus v. Archer*, 67 N. W. Rep. 912; *St. Mary's College v. Meagher*, 11 S. W. Rep. 618; *First Nat. Bk. v. Fidelity Co.*, 40 So. Rep. 415; *Gato v. Warrington*, 19 So. Rep. 883.

Plaintiff in error is concluded by its payment to the contractor by the certificates authorizing the same, and by its permitting the completion of the building. 16 Cyc. 721-805; *United States v. Hurley*, 182 Fed. Rep. 776; *Quinn v. New York*, 45 N. Y. Supp. 7; *Katz v. Bedford*, 77 California, 319; *Toppan v. Railroad Co.*, 24 Fed. Cas. 56, 59, Case No. 14099.

Disregard of the provisions relating to the time of payment releases the surety. *Commissioners v. Branham*, 57 Fed. Rep. 181; *Bank v. Fidelity Co.*, 40 So. Rep. 418; *Shelton v. Am. Surety Co.*, 131 Fed. Rep. 210; *Coughran v. Bigelow*, 164 U. S. 301.

Requiring and permitting the contractor to retain possession and reconstruct the building after rejection constituted a departure from the contract, abrogated the same, waived the contractor's previous breaches, extended his time for performance, contributed to loss by fire, surrendered a valuable security, enlarged the surety's risk and discharged the bond. *United States v. De Visser*, 10 Fed. Rep. 642, 657; *Earnshaw v. Boyer*, 60 Fed. Rep. 528; *United States v. Gleason*, 175 U. S. 588; *Mundy v. Stevens*, 61 Fed. Rep. 77, 83; *Roberts v. Donovan*, 70 California, 108; *Aetna Ins. Co. v. Fowler*, 66 N. W. Rep. 470.

The Government prevented the contractor, without notice and without cause, from completing the work; and the bond was thereby discharged. *Mundy v. Stevens*, 61 Fed. Rep. 77, 82; *Fidelity Co. v. United States*, 137 Fed. Rep. 886; *Clark v. Dalziel*, 3 Cal. App. 121; *Clark v. United States*, 6 Wall. 543; *United States v. Smith*, 94 U. S. 214.

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The making of a new and materially different contract after the lapse of more than a year from the date of the ejection of Boggs, the original contractor, from the reservation, with changed conditions in the building market and for a substantially different building, to be constructed according to plans and specifications differing in more than two hundred respects from the plans and specifications under the Boggs contract, furnishes no basis of estimating the damages of the plaintiff in error. *United States v. Axman*, 234 U. S. 36; 3 Page on Contracts, § 1580; *Lonergan v. Waldo*, 179 Massachusetts, 135; *United States v. Freel*, 92 Fed. Rep. 299; *S. C.*, 99 Fed. Rep. 237; *S. C.*, 186 U. S. 309; *Alcatraz Ass'n v. Fidelity Co.*, 3 Cal. App. 338.

As no measure of damage is shown, and none can be shown, no recovery is possible. *United States v. Axman*, 234 U. S. 36; *Am. Surety Co. v. Woods*, 105 Fed. Rep. 741; *Am. Bonding Co. v. Gibson Co.*, 127 Fed. Rep. 671; *United States v. Freel*, 186 U. S. 309; *Miller v. Stewart*, 9 Wheat. 680; *Reese v. United States*, 9 Wall. 13; *United States v. Stone, Gravel Co.*, 177 Fed. Rep. 321; *Chesapeake Transit Co. v. Walker*, 158 Fed. Rep. 850; *United States v. Grosjean*, 184 Fed. Rep. 593.

The retention by the Government of the contractor's materials for more than a year, and surrender of them to the new contractor at less than half price, released the surety. *Montgomery v. Sayre*, 100 California, 182, 185.

The Government's failure to notify surety discharged the bond. *United States v. Freel*, 186 U. S. 309; *United States v. McIntyre*, 111 Fed. Rep. 590, 597; *Mundy v. Stevens*, 61 Fed. Rep. 77, 85; *Tuohy v. Woods*, 122 California, 665, 667; *Alcatraz Ass'n v. U. S. Fidelity Co.*, 3 Cal. App. 338, 342; *Moses v. United States*, 116 Fed. Rep. 526, 529; *United States v. Smith*, 94 U. S. 214; *Clark v. United States*, 6 Wall. 543; *Ætna Ins. Co. v. Fowler*, 66 N. W. Rep. 470; *Roberts v. Donovan*, 70 California, 108.

The contractor's offer to perform released the surety under the California Civil Code. *Daneri v. Grazzola*, 139 California, 416; Cal. Civil Code, § 2839.

The Government's claim for interest is without merit. *Stephens v. Bridge Co.*, 139 Fed. Rep. 248; *Krasilnikoff v. Dundon*, 8 Cal. App. 406, 411, 412; Cal. Civil Code, § 1504; *Wadleigh v. Phelps*, 149 California, 627, 642; *Ferrea v. Tubbs*, 125 California, 587, 690; *United States v. Quinn*, 122 Fed. Rep. 65; *United States v. Sanborn*, 135 U. S. 271; *Redfield v. Iron Co.*, 110 U. S. 174; *Redfield v. Bartels*, 139 U. S. 694.

The sureties' defenses were well pleaded.

MR. JUSTICE PITNEY, after making the foregoing statement, delivered the opinion of the court.

The Circuit Court of Appeals held, in substance, that because after the default of Boggs in the performance of his contract the Government waited more than a year before entering into a new contract, during which time there was a material change in the cost of labor and building supplies, and because the new contract then made between the Government and Owen was different in substantial particulars from that upon which the Guaranty Company became surety, the second contract furnished no proper basis for estimating the damages sustained by plaintiff by reason of the breach of the first, and therefore the Guaranty Company was wholly released from liability.

For present purposes we assume the entire correctness of the court's view that because of the substantial differences between the work that was the subject of the Boggs contract and the work that was afterwards let to Owen, the latter contract furnished no proper basis for ascertaining the damages accruing to the Government by reason of the default of Boggs. The court rested its decision

to this effect upon the language of Article 4 of the Boggs agreement and its own previous decision in *American Bonding Co. v. United States*, 167 Fed. Rep. 910, since affirmed by this court in *United States v. Axman*, 234 U. S. 36.

But the question whether, by the letting of the Owen contract, or by whatever else was done or omitted by the Government about rebuilding after the default of Boggs, the responsibility of his surety was wholly discharged, is a very different question, not concluded by the decision in the case cited. There the Government, upon Axman's default, "annulled" his contract pursuant to its fourth paragraph; that is, undertook to complete it in his stead and charge him with the excess cost. As appears from the reports of the case (167 Fed. Rep. 915; 234 U. S. 42, 43), it was "not a suit to recover generally whatever damages the United States would have sustained had Axman abandoned his contract, but a suit for damages under the express stipulations of the contract;" that is to say, under its fourth paragraph. No other question was considered or decided.

In the present case, Boggs wholly failed to construct the building called for by his contract, either within the time prescribed or at any time. His work and materials, and the building as he offered it for acceptance, were rejected by the Government, and thereafter, while remaining in his possession, the structure was completely destroyed by fire. He then took no steps to construct or reconstruct the building in accordance with the contract, but continued to wilfully disregard its obligations, so that after waiting for an additional month and more the Government took possession of the site and required him and his representatives to vacate the premises, which they immediately did. His default was complete, and upon the findings it cannot be deemed to have resulted from anything done or omitted by the Government. Nor did the Government receive

anything of value from him or as a result of his work, except the building materials, tools, and implements that were confiscated and for which allowance was made in the judgment. Upon this state of facts, the Guaranty Company's liability clearly became fixed upon the occurrence of the default; and it was not released by the failure of the Government to have the same work completed in accordance with Article 4, unless by the fair meaning of the agreement the Government was obliged to rebuild or at least was excluded from recovering damages upon any other basis than a completion of the building, as permitted by that Article. For it is plain, we think, that the making of the new contract cannot be regarded as an alteration of the Boggs contract to the exoneration of his surety. The very fact that the differences were so material as to exclude the Owen contract from consideration as a thing done by the Government under the Boggs contract, leaves it without any relation to the rights of the present parties. Their rights and liabilities between themselves, being already fixed by the complete breach of the Boggs agreement, were not to be affected by any subsequent and independent transaction between the Government and third parties.

Is the Government, then, remediless against the Guaranty Company for the default of its principal? The contract was entire and indivisible; a completed building was the thing bargained for; the partial payments were not to be considered as an acceptance of any work or material; they were to be "eighty per centum of the value of the work executed, . . . the amount of each payment to be computed upon the actual amount of labor and materials expended"; the balance was to be "retained until the completion of the entire work," and forfeited in the event of non-fulfillment of the contract, but such forfeiture was not to relieve the contractor from liability for any and all damages by reason of any breach of the contract. Aside

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from the particular effect of Article 4, which will be considered presently, the true intent and meaning are plain: the "progress payments" were not to be treated as payments for parts of a building, but as partial payments advanced on account of a building to be completed thereafter as agreed. The contractor's right to retain them was conditioned upon his subsequent fulfillment of the contract. And when he wholly defaulted, and in effect abandoned the contract, the most direct and immediate loss sustained by the Government was the moneys it had paid him on account, and for which he had given nothing in return. Conceding that there was not, technically, a failure of consideration, because his promise and not its performance was in strictness the consideration (*United & Globe Rubber Mfg. Co. v. Conard*, 80 N. J. L. 286, 293), still the substance of the matter is the same, so far as concerns the measure of the detriment to the promisee.

The general rule, that a contract for the complete construction of a building for an entire price, payable in instalments as the work progresses, is an entire contract, and that a wilful refusal by the contractor to complete the building entitles the owner to a return of the instalments paid, has been declared by the state courts in a number of cases. *School Trustees v. Bennett*, 27 N. J. L. 513, 517; 72 Am. Dec. 373, 374; *Tompkins v. Dudley*, 25 N. Y. 272; 82 Am. Dec. 349; *Bartlett v. Bisbey*, 27 Tex. Civ. App. 405, 408; 66 S. W. Rep. 70; and cases cited. This court, in a case that has been often cited and followed, where a government contractor, without fault of his own, was prevented from performing his contract owing to the abandonment of the project, held that he was entitled to recover from the United States what he had expended towards performance (less the value of his materials on hand), although he failed to establish that there would have been any profits. *United States v. Behan*, 110 U. S.

338, 344. And see *Holt v. United Security Life Ins. Co.*, 76 N. J. L. 585, 597.

We do not think Article 4 can properly be so construed as to restrict the Government to the remedy there indicated in the event of default by the contractor, or to exclude recovery of the actual damages directly attributable to such default if, in the reasonable exercise of its rights, the Government determines not to complete the building. In the language of the Article, the Government is "authorized and empowered"—not "obliged"—to complete the work at the expense of the contractor; "*in which event*" the contractor and his sureties shall be "*further liable for any damages incurred through such default and any and all other breaches of this contract.*" The phraseology indicates a purpose to give to the Government a right additional to those it would otherwise have; the stipulation is made for its benefit, and, being optional in form, cannot be construed into a covenant in favor of the defaulting contractor or his surety. Even in case the option is exercised, the language quoted leaves contractor and surety liable for other damages; *a fortiori*, the intent is to preserve their liability in case the option is not exercised.

We have not overlooked the familiar rule that a party suffering loss from breach of contract ought to do what a reasonable man would to mitigate his loss. *Wicker v. Hoppock*, 6 Wall. 94, 99; *Warren v. Stoddart*, 105 U. S. 224, 229. But there is nothing in the facts as found to call for the application of this rule; for there is nothing to show that the Government acted unreasonably in not exercising its option to rebuild under Article 4. Nor does it appear that the loss would probably have been lessened by rebuilding; the "progress payments" would of course have remained as a part of the loss, in addition to the cost of new construction.

In our opinion, therefore, the Court of Appeals erred

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in holding that, because of the failure of the Government to complete Boggs' agreement in accordance with Article 4, the surety was released.

The Guaranty Company insists, however, that there are other grounds upon which the decision in its favor may be sustained: that the representatives of the Government were grossly negligent in making advance payments to Boggs, in view of the supposed fact that the building contract was then being openly and flagrantly violated, and the defects in the work were conspicuously evident; that the Government is concluded by the fact of making these payments, or, if not, then by its alleged disregard of the provisions of the contract relating to the time of making them; and that in these and other respects the Government departed from the contract, waived breaches by the contractor, extended his time for performance, surrendered valuable security, and enlarged the surety's risk, thereby releasing it from liability. Assuming these defences were properly pleaded, we still need spend no time upon them, since the argument made here to support them is based, not upon the findings, but upon a general review of the evidence and a series of inferences drawn from it that are inconsistent with the facts as found by the trial court. The findings have the same effect as the verdict of a jury, and this court does not revise them, but merely determines whether they support the judgment. Rev. Stat., §§ 649, 700, 1011 (amended by Act of February 18, 1875, c. 80, § 1, 18 Stat. 318); *Norris v. Jackson*, 9 Wall. 125, 128; *St. Louis v. Ferry Co.*, 11 Wall. 423, 428; *Dickinson v. Planters' Bank*, 16 Wall. 250, 257; *Insurance Co. v. Folsom*, 18 Wall. 237, 248; *British Queen Mining Co. v. Baker Silver Mining Co.*, 139 U. S. 222.

It results, from what has been said, that the judgment of the Circuit Court of Appeals discharging the Guaranty Company from liability must be reversed. And we next consider what judgment ought to have been rendered by

that court upon the record and bill of exceptions brought up from the trial court, in view of the assignments and cross-assignments of error. *Baker v. Warner*, 231 U. S. 588, 593; *Baer Bros. v. Denver & R. G. R. R.*, 233 U. S. 479, 490; *Fort Scott v. Hickman*, 112 U. S. 150, 164, 165; *Allen v. St. Louis Bank*, 120 U. S. 20, 30, 40; *Cleveland Rolling Mill v. Rhodes*, 121 U. S. 255, 264.

In addition to the questions already disposed of, it is contended in behalf of the Guaranty Company that the Government's claim for interest is without merit and ought to have been overruled. Interest was allowed upon the advance payments, not from the respective dates upon which they were made but from the date when by the terms of the contract the building ought to have been completely finished. In view of the facts, we think there was here no error. The findings make it clear that Boggs not only wilfully and persistently but fraudulently departed from the requirements of his contract, and refused to perform its obligations. He therefore accepted the money well knowing that he had no just right to it; and certainly when the time fixed for complete performance expired, without any attempt on his part to perform it, then, if not sooner, his obligation to return the money to the Government was clear, and he was not under the circumstances entitled to await a demand from the Government before repaying it. The suggestion that the Government has waived interest by delay in pressing its claim is untenable. The cases cited under this head (*Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174; *United States v. Sanborn*, 135 U. S. 271, 281; *Redfield v. Bartels*, 139 U. S. 694, 702), are plainly distinguishable.

On the other hand, the Government insists that it is entitled to recover as against the Guaranty Company, in addition to the penal sum named in the bond, interest thereon from September 1, 1905, the date of Boggs' default, or at least from January 16, 1906, when it is said

the surety was notified of the default. We are referred to nothing, and have observed nothing, in the findings to the effect that such notice was given to the surety at or about the date mentioned. The action was commenced more than two years thereafter. But, aside from this, the only exception taken in the trial court to furnish support for the present contention was: "To the failure of said court to . . . decide that plaintiff is entitled to interest on the sum of \$6,500 from the first day of September, 1905, and to the failure of the court to enter judgment against defendant for such interest." We do not think this is sufficient to attribute error to the trial court as for overruling a claim for interest on the penalty of the bond from the time of demand made upon the surety, or notice to it of the principal's default. No such point was raised. The claim that was made and overruled was for interest from the time of the default, irrespective of notice to the surety; and that presents a very different question of law.

The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court. *Beaver v. Taylor*, 93 U. S. 46, 55; *Robinson & Co. v. Belt*, 187 U. S. 41, 50; *Addis v. Rushmore*, 74 N. J. L. 649, 651; *Holt v. United Security Life Ins. Co.*, 76 N. J. L. 585, 593. And the practice respecting exceptions in the Federal courts is unaffected by the Conformity Act, § 914, Rev. Stat. *Chateaugay Iron Co., Petitioner*, 128 U. S. 544, 553; *St. Clair v. United States*, 154 U. S. 134, 153.

We merely consider, therefore, whether (where the actual damages exceed the amount of the penalty), the

United States is entitled, as against the surety, to interest upon the penal sum from the time of the principal's default, in the absence of notice of the default given to the surety, or any demand made upon it. There has been much contrariety of opinion upon the question whether, in any case, the obligee in a penal bond can recover interest in addition to the penalty. The weight of authority in England is adverse to the recovery. 1 Wms. Saunders, 58; *note*; *White v. Sealy*, 1 Doug. 49; *Wilde v. Clarkson*, 6 Term. Rep. 303 (disapproving *Ld. Lonsdale v. Church*, 2 Term Rep. 388); *Tew v. Winterton*, 3 Bro. C. C. 489; 29 Eng. Reprint, 660, 663, *note*. In this country the tendency of the decisions in the state courts seems to be in favor of the allowance of such interest. *Perit v. Wallis* (Pa. Sup. Ct.), 2 Dall. 252, 255; *Williams v. Willson*, 1 Vermont, 266, 273; *Judge of Probate v. Heydock*, 8 N. H. 491, 494; *Wyman v. Robinson*, 73 Maine, 384, 387; *Carter v. Thorn*, 18 B. Mon. (Ky.) 613, 619. The bond in suit appears to have been made in California, but the contract was to be performed upon a Government reservation within what was then the Territory of Arizona. (See *Scotland County v. Hill*, 132 U. S. 107, 117.) We are referred to nothing in the law of that State or Territory indicating a local rule. In this court, although the question seems not to have frequently arisen, the English rule has usually but not invariably been followed. *McGill v. Bank of United States*, 12 Wheat. 511, 515; *Farrar v. United States*, 5 Pet. 373, 385; *Ives v. Merchants' Bank*, 12 How. 159, 164, 165; *United States v. Broadhead*, 127 U. S. 212.

In the state of the decisions, we may safely apply the rule followed by Mr. Justice Clifford in a case at the circuit, and we need go no further in order to overrule the contention raised by the Government at the trial of the present case: "Sureties, if answerable at all for interest beyond the amount of the penalty of the bond given by their principal, can only be held for such an amount as

accrued from their own default in unjustly withholding payment after being notified of the default of the principal." *United States v. Hills*, 4 Cliff. 618; Fed. Cas. No. 15,369. This is, in effect, the same rule followed by this court in *Ives v. Merchants' Bank*, *supra*. See also *United States v. Quinn*, 122 Fed. Rep. 65.

We find nothing else in the record requiring discussion. The result is that the judgment of the Circuit Court of Appeals should be reversed, and that of the Circuit Court affirmed.

Judgment reversed.

MR. JUSTICE McREYNOLDS took no part in the consideration or decision of this case.